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1948

THE

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AND

PEERAGE CASES.

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FOR

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[PRIVY COUNCIL.]

J. C.*

1947

July 31.

ARIEH ZVI LIPSHITZ . . . APPELLANT;

AND

HAIM ARON VALERO AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE SITTING AS A COURT OF APPEAL.

Palestine — Supreme Court — Appellate jurisdiction — Appeals from District Court as court of first instance only—Palestine Order in Council, 1922 (*St. R. & O.* 1922, *No.* 1282), *art.* 43—*Magistrates' Courts Jurisdiction Ordinance, No.* 45 *of* 1939, *s.* 12—*Ultra vires.*

Appeal to Privy Council—Value of "matter in dispute"—Palestine (*Appeal to Privy Council*) *Order in Council,* 1924 (*St. R. & O.* 1924, *No.* 1243).

By art. 43 of the Palestine Order in Council, 1922, " . . . . The " Supreme Court sitting as a Court of Appeal shall have jurisdiction " subject to the provisions of any Ordinance to hear appeals from " all judgments given by a District Court in first instance . . . . "

Article 43 of the Palestine Order in Council, 1922, specifies and limits the appellate jurisdiction of the Supreme Court, and when, as in that article, a specified jurisdiction is declared by the Order in Council to be subject to Ordinances, it is intended that the High Commissioner shall have power, not to enlarge the jurisdiction of the court by Ordinance, but only to prescribe by Ordinance such

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* *Present:* LORD SIMONDS, LORD NORMAND and LORD MACDERMOTT.

J. C.

1947

ARIEH ZVI LIPSHITZ *v.* HAIM ARON VALERO.

procedure and practice as cannot be appropriately dealt with by rules made under art. 49. Accordingly, s. 12 of the Magistrates' Courts Jurisdiction Ordinance, which provided that the decision of the District Court in an appeal from a Magistrate's Court should be final, " but the presiding judge of the District Court which heard " the appeal may, if the decision involves a point of law of novelty, " complexity or general importance, grant leave to appeal to the " Supreme Court sitting as a Court of Appeal," was ultra vires the High Commissioner, and the Supreme Court sitting as a Court of Appeal had no jurisdiction to entertain an appeal from the decision of a District Court sitting as an appellate court.

Doukhan v. *Drucker* (unreported) (No. 177 of 1938), approved.

Judgment of Copland J. in *Jerusalem Municipal Corporation* v. *Catton* (1938) 5 Pal. L. R. 488, approved.

By art. 3 (*a*) of the Palestine (Appeal to Privy Council) Order in Council, 1924, " . . . . an appeal shall lie as of right, from any " final judgment of the court, when the matter in dispute on the " appeal amounts to or is of the value of 500*l*. sterling or " upwards . . . ."

On a claim by the respondent for possession of land which he had leased to the appellant on a monthly tenancy at a rent of £P. 13.500 a month, and on which the appellant had erected a building at a cost of £P. 450, the appellant had pleaded, inter alia, that the action was contrary to the provisions of the Rent Restrictions (Business Premises) Ordinance, 1941. The Supreme Court of Palestine, reversing the decision of the District Court, restored the judgment of the Magistrate's Court in favour of the respondent, and, on an application by the appellant, granted leave to appeal to the Privy Council, holding that the tenancy right amounted in value to at least £P. 50 and the value of the building to £P. 450. On an objection by the respondent that the Privy Council had no jurisdiction to entertain the appeal on the grounds that all that was in dispute was the appellant's right to occupy a small piece of land, and that the value of the building did not enter into the value of " the matter in dispute " since there was no mention of it in the statement of claim or pleadings and no decision had been made respecting it :

Held, that the Supreme Court had applied the right test under art. 3 (2.) of the Order in Council of 1924, which was whether it was worth 500*l*. to the appellant that the Rent Restrictions (Business Premises) Ordinance should be held to give him protection against an order to vacate the land leaving on it a building which cost £P. 450 to erect.

Judgment of the Supreme Court of Palestine (1943) 10 Pal. L. R. 584, set aside.

APPEAL (No. 24 of 1945) from a judgment of the Supreme Court of Palestine sitting as a Court of Appeal (November 24, 1943) reversing a judgment of the District Court of Jerusalem in its appellate capacity (June 18, 1943) and restoring the

J. C.

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ARIEH ZVI LIPSHITZ *v.* HAIM ARON VALERO.

judgment of the Magistrate's Court of Jerusalem (February 28, 1943) in favour of the plaintiff, the present respondent.

The following facts are taken from the judgment of the Judicial Committee. The appellant, the defendant in the action, was the owner of a café in King George Avenue, Jerusalem. The deceased Moshe Valero, the plaintiff and the original respondent, was the owner of an adjoining piece of land. From 1937 to 1940 the appellant took a part of that land on yearly lease for use as a garden for his café. Then, by agreement in writing, executed on November 28, 1940, the respondent let to the appellant part of the land of an area of 7½ x 6½ metres as a garden for the café for twelve months at a rent of £P. 60. Subsequently the parties added a clause to that agreement providing for the contemplated event of the appellant building a winter garden on the leased land; and during the currency of the lease the appellant in fact built a winter garden at a cost exceeding £P. 500. On November 28, 1941, the parties entered into another agreement by which the respondent let to the appellant the same area of ground as had been let by the agreement of November 28, 1940, and an additional area of 50 square metres. The lease bore to be granted " for the arrangement of a " garden " for the appellant's café. The lease was for one month and the rent was £P. 13.500, payable in advance. Other provisions of that lease were as follows:

> " 3. In the event of the lessor needing the plot of land for " the purpose of building or for any other purpose whatso-" ever, the lessee must vacate the said plot within three days " from the receipt of a notice in writing from the lessor of his " desire in that regard; in such an event the lessor shall have " to return to the lessee the proportional rent for the remain-" der of the period during which the lessee shall not have " used the plot in consequence of the demand by the lessor " as aforesaid and this agreement shall be deemed abrogated " upon the delivery of a notice as aforesaid.
>
> " 4. All the construction which the lessee shall make shall " remain his private property, it being expressly provided " that at the end of the term of lease or upon demand being " made by the lessor to vacate the land under cl. 3 of this " agreement it shall be removed. Should the lessee fail to " vacate the let property as aforesaid all the construction " made by the lessee shall remain the property of the lessor, " and the lessee may not claim the expenses he had incurred " therefor.

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" 5. Should there be no notice by the lessor under cl. 3 " or for any other arrangement, this agreement shall be " renewed automatically for one further month and so forth " month by month on the same conditions as in this agree- " ment are included, provided that the lessee shall notify the " lessor of his such desire three days before the expiration of " each month and shall pay the monthly amount of " £P. 13.500 in advance."

The appellant did not give notice under the fifth clause of that agreement, but he paid the rent of £P. 13.500 on November 28, 1941, and on the twenty-eighth day of each of the five following months. Instead of tendering payment of the next monthly rent on May 28, 1942, the appellant tendered payment on May 31, 1942. That tender was not accepted, and by letter of the same date the respondent gave notice under cl. 3 of the agreement terminating the lease because the ground was needed by him for another purpose, and stating that the appellant had committed a breach of the agreement by failing to pay the rent due on May 28, 1942. As the appellant remained in possession of the premises the present action was commenced on June 10, 1942, for an order on him to vacate. One of the grounds of defence, and the only ground now maintained, was that the action was contrary to the provisions of the Rent Restrictions (Business Premises) Ordinance, 1941. On February 28, 1943, the magistrate gave judgment in favour of the plaintiff, and on June 18, 1943, the District Court of Jerusalem on appeal set aside the magistrate's judgment and dismissed the action. Leave to appeal to the Supreme Court was applied for, and granted, and on November 24, 1943, the Supreme Court allowed the appeal and restored the magistrate's judgment. The appellant then applied to the Supreme Court under art. 3 (*a*) of the Palestine (Appeal to Privy Council) Order in Council, 1924, for leave to appeal to His Majesty in Council. That application was opposed, but on February 1, 1944, the Supreme Court granted conditional leave as of right.

The plaintiff, as stated, was the original respondent in this appeal, but he died in July, 1945, and the present respondents were substituted as respondents in his place by an Order in Council of December 7, 1945.

The respondents denied the jurisdiction of the Board; and the appellant denied the jurisdiction of the Supreme Court to entertain the appeal from the District Court. It was first necessary, therefore, to decide whether the Board had jurisdiction to entertain the appeal, and if the Board's jurisdiction was upheld, it would then be necessary to decide whether the Supreme Court had jurisdiction to entertain the appeal from the judgment of the District Court; and the Board would become concerned with the merits of the dispute between the parties only if the jurisdiction of the Supreme Court also was upheld.

1947. July 15, 16. *Raymond Jennings K.C.* and *D. H. Cohen* for the appellant.

Sir William McNair K.C. and *A. S. Diamond* for the respondents.

July 31. The judgment of their Lordships was delivered by Lord Normand, who stated the facts set out above, and continued: The first question is whether the Supreme Court should have refused the application for leave to appeal on the ground that this Board has no jurisdiction. Article 3 (*a*) of the Palestine (Appeal to Privy Council) Order in Council, 1924 (St. R. & O. 1924, No. 1243), is in these terms: "Subject " to the provisions of this Order, an appeal shall lie (*a*) as " of right, from any final judgment of the court, where the " matter in dispute on the appeal amounts to or is of the value " of 500*l.* sterling or upwards, or where the appeal involves " directly or indirectly, some claim or question to or respecting " property or some civil right amounting to or of the said value " or upwards." The respondents maintain that the Board has no jurisdiction because all that is in dispute or in any way involved in the appeal is the appellant's right to occupy a small piece of land, and that this right of occupation, having been granted under a lease for one month terminable on three days' notice and at a rent of only £P. 13.500 a month, is worth £P. 50 at most. They maintain also that the value of the building erected by the appellant on the land leased by him does not enter into the value of " the matter in dispute " or of the right claimed, since there is no mention of the building in the statement of claim or pleadings and no decision has to be made respecting it. Their Lordships are of opinion that this is too narrow a construction of art. 3, and that the true test under the article is whether it is worth 500*l.* to the appellant that the Rent Restriction Ordinance should be held to give him protection against an order to vacate the land leaving on it a building which cost 450*l.* to erect. This is the test which was

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applied by the learned judges of the Supreme Court, who held that the tenancy right amounted in value to at least £P. 50 and the value of the building to £P. 450.

It is therefore necessary to consider next whether the Supreme Court had jurisdiction to entertain the appeal from the District Court of Jerusalem. Section 12 of the Magistrates' Courts Jurisdiction Ordinance (No. 45 of 1939) provides that "The decision of the District Court in an appeal from a "magistrate's court shall be final, but the presiding judge of the "District Court which heard the appeal may, if the decision "involves a point of law of novelty, complexity or general "importance, grant leave to appeal to the Supreme Court "sitting as Court of Appeal." In this case the presiding judge of the District Court granted leave to appeal, and accordingly there was jurisdiction in the Supreme Court unless s. 12 can be successfully challenged as ultra vires, and that is what is now in issue. The decision depends primarily on the meaning and effect of art. 43 of the Palestine Order in Council, 1922 (St. R. & O., 1922, No. 1282). It is one of a series of articles forming part V of the Order in Council, the heading of which is "Judiciary," and it will be convenient to set out those articles in part V, or so much of them as was specially referred to in the argument.

Article 38 (as amended by the Palestine (Amendment) Order in Council, 1935). "Subject to the provisions of this "part of this Order and any Ordinance or rules, the civil courts "hereinafter described, and any other courts or tribunals "constituted by or under any of the provisions of any "Ordinance, shall exercise jurisdiction in all matters and over "all persons in Palestine."

Article 39 (as amended by the Order in Council of 1935). "Magistrates' courts shall be established in each district and "sub-district as may be prescribed from time to time by Order "under the hand of the High Commissioner. These courts "shall have the jurisdiction assigned to them by the Ottoman "Magistrates Law of 1913, as amended altered or extended by "any subsequent law or Ordinance or Rules for the time being "in force."

Article 40. "District courts shall be established in such "districts as may be prescribed from time to time by Order "under the hand of the High Commissioner, and every such "court shall exercise jurisdiction:

"(1.) As a Court of First Instance:

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" (*a*) In all civil matters not within the jurisdiction of " the magistrates' courts in and for that district.

" (*b*) In all criminal matters which are not within the " jurisdiction of the Court of Criminal Assize.

" (2.) As an Appellate Court from the said magistrates' " courts subject to the provisions of any Ordinances or " Rules."

Article 41. " There shall be a Court of Criminal Assize which " shall have exclusive jurisdiction with regard to offences " punishable with death and such jurisdiction with regard to " other offences as may be prescribed by Ordinance."

Article 42 (as amended by Order in Council of 1939). " The " High Commissioner may, by order under his hand, establish " Land Courts and determine the area of their jurisdiction. " The constitution of such courts, and the matters in which they " shall have jurisdiction within the area so determined, shall " be prescribed by Ordinance.

Article 43. " There shall be established a court to be called " the Supreme Court of which the constitution shall be " prescribed by Ordinance. The Supreme Court sitting as a " Court of Appeal shall have jurisdiction subject to the provisions of any Ordinance to hear appeals from all judgments " given by a District Court in first instance . . . . . "

Article 49. " The Chief Justice may, with the approval of the " High Commissioner, make rules for regulating the practice " and procedure of the Supreme Court and of all other civil " courts which are or may be established in Palestine."

Article 64 (1.) " Matters of personal status affecting foreigners " other than Moslems shall be decided by the District Courts, " which shall apply the personal law of the parties concerned " in accordance with such regulations as may be made by the " High Commissioner, provided always that the courts shall " have no jurisdiction to pronounce a decree of dissolution of " marriage until an Ordinance is passed conferring such " jurisdiction."

It will also be necessary to refer to the following :

Article 17 (1.) (*a*) (as amended by Order in Council of 1923). " The High Commissioner shall have full power and authority, " without prejudice to the powers inherent in, or reserved by " this Order to His Majesty, and subject always to any conditions and limitations prescribed by any such instructions " as may be given to him under the Sign Manual and Signet " or through a Secretary of State, to promulgate such

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"Ordinances as may be necessary for the peace, order and good "government of Palestine, provided that no Ordinance shall "be promulgated which shall restrict complete freedom of "conscience and the free exercise of all forms of worship, "save in so far as is required for the maintenance of public order "and morals; or which shall tend to discriminate in any way "between the inhabitants of Palestine on the ground of race, "religion, or language."

Article 87. "The High Commissioner may by Proclamation "in the Gazette at any time within one year from the date of "the commencement of this Order, and provided he has "previously obtained the approval of the Secretary of State, "vary, annul or add to any of the provisions of this Order in "order to carry out the purposes of the same, and may provide "for any other matters necessary in order to carry into effect "the provisions thereof."

Article 88. "His Majesty, His heirs and successors in "Council, may at any time revoke, alter or amend this Order."

The Orders in Council are, it may be noted, made in exercise of the powers vested in His Majesty by the Foreign Jurisdiction Act, 1890 (53 & 54 Vict., c. 37), s. 12, to assign to or confer on any court held under the authority of His Majesty, any jurisdiction, civil or criminal, original or appellant, which may lawfully by Order in Council be assigned to or conferred on any British court in any foreign country, and to make such provisions and regulations as to His Majesty in Council seem meet respecting the exercise of the jurisdiction so assigned or conferred and respecting the enforcement and execution of the judgments, decrees, orders and sentences of any such court, and respecting appeals therefrom.

The appellant maintained that s. 12 of the Magistrate's Courts Jurisdiction Ordinance (No. 45 of 1939) is ultra vires, because the Order in Council has by art. 43 specified the appellate jurisdiction of the Supreme Court and the Order has not given power to the High Commissioner to extend that jurisdiction by Ordinance. The respondents maintained that part V of the Order in Council is but an outline of the civil courts which the High Commissioner is given power to fill in by means of Ordinances, and, in particular, that he has power under art. 43 itself to vary and extend the jurisdiction therein conferred on the Supreme Court sitting as a Court of Appeal. Their counsel construed the words "shall have jurisdiction "subject to the provisions of any ordinance to hear [certain] "appeals" as meaning "shall have jurisdiction to hear "certain appeals and such other appeals as any Ordinance "shall provide," and the question really is whether that construction is right or whether the sound construction is, "shall "have jurisdiction subject to the provisions of any ordinance to "hear certain appeals and no others." If the restrictive construction is the true one, the ordinances contemplated by the article would, it is admitted, necessarily be confined to the regulation of matters of procedure and practice (for example, prescribing the time for appeals or the conditions under which appeals may be taken without leave) which are not appropriate for Rules of Court made under art. 49. Their Lordships are of opinion that that is the true meaning of the article and that the respondents' construction strains and distorts its language. This opinion is fortified by a comparison of the language of the article with that of other articles in part V. Article 38 gives to the civil courts as a whole universal jurisdiction in all matters and over all persons in Palestine. It is impossible to widen this jurisdiction by a Palestine Ordinance, and it cannot be supposed that power would be given to exclude by Ordinance any matter or person in Palestine from the jurisdiction of the civil courts. Therefore, the Ordinances to which the jurisdiction of the civil courts as a whole is declared by the article to be subject can only be such as might deal with matters of practice and procedure. The language of arts. 39, 41, 42 and 64 (1.) shows that, when it is intended to provide for amendment, alteration or extension of jurisdiction by Ordinance, the intention is expressed in clear and unambiguous terms, and nothing is left to doubtful inference or implication. Article 40 (1.) draws the distinction between District Courts as courts of first instance and as Courts of Appeal, and this important distinction becomes in art. 43 the basis of the definition of the Supreme Court's jurisdiction. In art. 40 (2.) the Ordinances contemplated can only be Ordinances regulative of procedure and practice, for the article has already given to the District Courts all the appellate jurisdiction which can be given to them, by giving them jurisdiction to hear appeals from the only court subordinate to them established by the Order in Council. The powers of amendment under arts. 87 and 88 are fully adequate for the purpose of amending those articles which deal with jurisdiction and which themselves make no express provision for amendment by Ordinance.

Accordingly the conclusions relevant to the issue in the appeal which result from this examination of the Order are: (1.) Article 43 specifies and limits the appellate jurisdiction of the Supreme Court, and (2.) when a specified jurisdiction is declared to be subject to Ordinances, it is intended only that the High Commissioner shall have power to prescribe by Ordinance such procedure and practice as cannot appropriately be dealt with by rules made under art. 49. If these conclusions are well founded it is not necessary to give separate consideration to the respondents' alternative contention, that the extension of the Supreme Court's appellate jurisdiction by Ordinance is warranted by art. 17 (1.) (*a*) (as amended), for the respondents' counsel admitted that if art. 43 confers a limited jurisdiction the High Commissioner has no power to extend it by ordinance made under art. 17 (1.) (*a*). It should be added that the respondents submitted an argument ab inconveniente for recognizing the validity of s. 12 of the Magistrate's Courts Jurisdiction Ordinance. This, however, is not an argument which can be allowed to affect the judicial construction of the Order in Council, and it is for the legislative power to remedy any inconvenience which may result from the present decision. Their Lordships therefore hold that s. 12 of the Magistrate's Courts Jurisdiction Ordinance is not within the powers conferred on the High Commissioner by the Order in Council and is ultra vires.

This question first came before the Supreme Court in *Doukhan* v. *Drucker* (1). In that case Copland A.C.J., Frumkin and Khayat JJ. held that they had no jurisdiction to entertain an appeal from the District Court sitting as an appellate court. The learned Acting Chief Justice said, "The words 'subject to the provisions of any Ordinance,' "in our opinion refer to the manner in which such appeals "shall be brought, such as imposing a limit of penalty below "which an appeal does not lie, imposing a definite period for "appealing, ordering that in any particular class of cases "appeal shall only be by leave, and such like matters, but "cannot extend the jurisdiction of the Supreme Court to allow "it to hear appeals from the District Court in its appellate "capacity." With this opinion their Lordships agree. The same question again came before the Supreme Court in *Jerusalem Municipal Corporation* v. *Catton* (2). On this occasion it was considered by a bench of five judges who, by a majority, held that the words "subject to the provisions

(1) No. 177 of 1938 (Unreported). (2) (1938) 5 Pal. L. R. 488.

"of any Ordinance" do empower the High Commissioner to enlarge the jurisdiction by Ordinance. Trusted C.J. based his decision partly on the ground that the practice of the Supreme Court had since 1924 conformed to the view that its jurisdiction had been enlarged, and that an amending Order in Council had been passed in 1935 which contained no provision correcting this practice, and he said that it was too late to raise the question of jurisdiction. Copland J., after examining the relevant articles of the Order in Council, adhered to the opinion which he had expressed in the earlier case. Frumkin J. on this occasion came to the opposite conclusion to that to which he had come in the previous case, and held that art. 43 did not restrict the jurisdiction of the Supreme Court to hearing appeals from the District Court sitting as a court of first instance. Khayat J. agreed with Copland J. and Abdul Hadi J. with the Chief Justice. Their Lordships find themselves in agreement with the clearly reasoned judgment of Copland J. They are unable to attach any importance to practice as interpreting an Order in Council of recent date, and they find in the amending Order in Council of 1935 nothing that implies approval of the practice of the Supreme Court or of the construction of art. 43 on which that practice had tacitly proceeded.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the Supreme Court should be set aside and that the judgment of the District Court should be restored. Counsel for the respondents submitted that as the appellant had not objected to the jurisdiction of the Supreme Court when application was made in the District Court for leave to appeal, nor when the case was before the Supreme Court itself, the costs to be awarded to him should be modified. But it does not appear that the appellant could, in view of the decision in *Jerusalem Municipal Council* v. *Catton* (1), have done more than reserve the point in the event of an appeal to this Board, or that such a reservation could have had any effect on the course of the litigation. The appellant is entitled to the costs of this appeal and in the courts in Palestine.

Solicitors for appellant: *Adler & Perowne.*
Solicitors for respondents: *Bartlett & Gluckstein.*

(1) (1938) 5 Pal. L. R. 488.

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[PRIVY COUNCIL.]

STERIOS THOMOPULOS AND ANOTHER . APPELLANTS;

AND

JOHN MANDILAS . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Nigeria—Partnership firm—Registration—Non-compliance with statutory requirements—Whether right of partner to bring action for dissolution against co-partners affected—Registration of Business Names Ordinance (*No.* 5 *of* 1926), *s.* 14.

The omission of a firm to register in the manner directed by the Registration of Business Names Ordinance, 1926, of Nigeria (which is couched in terms substantially similar to those of the British legislation on the same topic) does not prevent a partner from obtaining an order for dissolution of the firm. The results of non-compliance with the Ordinance are dealt with in ss. 8 and 14 thereof, the former providing for a monetary penalty, the latter that " where any firm . . . . required to furnish a statement of " particulars . . . . makes default in so doing the rights of such " defaulter under or arising out of any contract made or entered " into by or on behalf of such defaulter in relation to the business " in respect of which particulars were required at any time while " he is in default shall not be enforceable by action or otherwise. " Provided that—(*a*) the defaulter may apply to the court for " relief against the disability imposed by this section . . . ." Section 14 refers only to claims made by the defaulting firm against third parties, and there is no provision in the Ordinance which affects the right of one partner in a firm, which has failed to comply with the Ordinance, to bring an action against his co-partners and no reason why any such provision should be implied.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 27 of 1945) from a judgment of the West African Court of Appeal (Kingdon C.J. (Nigeria) (President), Harragin C.J. (Gold Coast) and Brooke J. (Nigeria)) (November 3, 1944), affirming a judgment of Baker J. in the Supreme Court of Nigeria (August 4, 1944), whereunder judgment was entered for the present respondent, the plaintiff, in the action in which he sought for a declaration that he and the appellants were partners in the firm of S. Thomopulos, for dissolution of the partnership and for consequential relief.

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* *Present:* LORD DU PARCQ, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

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The only issue in the action was whether or not there was a partnership between the respondent and the appellants.

The facts appear from the judgment of the Judicial Committee.

1947. July 3, 7. *Pritt K.C.* and *A. J. Hodgson* for the appellants.

Tucker K.C. and *J. V. Nesbitt* for the respondent.

July 30. The judgment of their Lordships was delivered by Lord Morton of Henryton. This is an appeal from a judgment of the West African Court of Appeal dismissing an appeal from a judgment of the Supreme Court of Nigeria in an action by the respondent against the appellants claiming (1.) a declaration that the respondent and the appellants were partners in the firm of S. Thomopulos; (2.) dissolution of the partnership; (3.) an account of the firm's profits and of the respondent's share thereof; and (4.) payment of such share.

Paragraph 1 of the respondent's statement of claim was as follows:—" By a verbal agreement made in or about March, " 1936, the plaintiff and defendants became partners in the " business carried on at 6, Davies Street, Lagos, and elsewhere " in Nigeria, under the firm name of S. Thomopulos, in terms " of which 50 per cent. of the profits of the business was to " belong to the first defendant and 25 per cent. each to the " plaintiff and the second defendant, the losses to be similarly " divided." It was then alleged that the appellants had wilfully and falsely denied the existence of the partnership and had refused to furnish to the respondent an account of " his " share in the partnership business." The relief claimed was as set out above. By their statement of defence the appellants, in effect, denied that the alleged partnership ever existed, and alleged that the respondent was merely an employee who had been dismissed.

The action was tried before Baker A.C.J. The respondent gave evidence that from April, 1930, till December, 1935, he and the second appellant were employees in a business of " general trade " carried on by the first appellant. The note of his evidence continues as follows:—" Whilst in Ondo at " Christmas, 1935, the two defendants both came and spent " Christmas with me. The second defendant was then " suffering from a disease and his hair was falling out, and we " decided he should immediately go home and consult some

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" doctors there about the disease. He left Nigeria in 1936. " It was also decided amongst the three of us that first " defendant should also go home on leave and on business at " the end of the financial year, i.e., 31st March, and I should " in the meantime take entire charge of the business. We " also discussed at that time after the 31st March the business " should become a partnership from the 1st April, 1936. We " decided that first defendant should take and suffer 50 per " cent. of the profits and losses and 25 per cent. to each of us " both profits and losses; this we all agreed to. That was " all that was discussed at Christmas. In March, 1936, " I went to Benin to take stock at Benin with first defendant. " I met first defendant there . . . . We discussed the " partnership and confirmed our Christmas agreement about " the partnership." It is common ground between the parties that no written agreement of partnership was ever drawn up, but their Lordships understand the evidence just quoted as meaning that a verbal agreement for a partnership was made, after discussion, at or about Christmas, 1935, such partnership to commence on April 1, 1936. The respondent was cross-examined at some length in regard to various matters, including certain entries in the books and certain statements which he had made, in letters and other documents, tending to show that he continued to be merely an employee in the business of the first appellant after April 1, 1936. He gave his explanation of these entries and statements and he was followed in the witness box by Mr. Frank George Lloyd, an income tax official, who produced a letter dated November 22, 1940, from the first appellant to the Commissioner of Income Tax at Lagos. In that letter the first appellant referred to " a balance of 15,448*l*. 9*s*. 11*d*. of profit made during 1936/37 " and 1937/38 " and continued—" Should you decide to tax " the amount of 15,448*l*. 9*s*. 11*d*., and this would be more " suitable to me, because it will correspond with my books— " the allocation should be made as follows, as regards as my " partners are concerned :—

		£	s.	d.
" Myself (S. Thomopulos)	50 per cent.	7,748	9	11
" A. Thomopulos ..	25 per cent.	3,850	0	0
" John Mandilas	25 per cent.	3,850	0	0."

On a profit and loss account for the two years to March 31, 1940, which was also produced by Mr. Lloyd, there appeared the words " Partners: S. Thomopulos, A. Thomopulos, "J. Mandilas" and it is not disputed that the first appellant wrote these words. Further on April 25, 1941, the first appellant wrote a letter to the Bank of British West Africa, Ld. which contained the following passage:—"*Joint Capital* "12,000*l.*—Owing to faithful co-operation on the part of my "brother, Mr. A. Thomopulos, and cousin, Mr. John Mandilas, "during the hard times we have passed in 1937/39, I am "intending of forming a limited liability company immediately "all liabilities of my business are paid, and with this object in "mind I have created this account. For the time being the "business is run on the same basis as since 1936, that is to "say I am having a share of 50 per cent. and my brother and "cousin 25 per cent. each, in the net profits, but all capital, "credit balance, etc., in our name are deemed to be working "capital in the business, and jointly and severally responsible "for all liabilities."

Having regard to the pleadings, one would have expected the first appellant to give evidence denying the existence of any partnership and explaining the documents mentioned above. He was not, however, called as a witness. The second appellant did give evidence, in the course of which he said:—"I regard myself as an employee and still do so. "I have never asked the first defendant of the payment over "to me of any moneys. I have never seen the books kept in "Lagos. S. Thomopulos is the owner of the business. There "was never any meeting amongst the three of us at Benin "in 1935 or at Ondo in which partnership was discussed. "All our respective families spent our Christmas at Ondo in "1935. We have spent other Christmases together. In "March, 1936, I was in Germany, and on my return there was "no mention of any partnership. Plaintiff, my brother and "myself have never met at any time to go into the accounts "of the business." He also said that in 1942 his brother "dismissed" the respondent, "telling him he was no more "employed in his business." This story does not accord with the respondent's evidence. The trial judge said, in regard to the second appellant: "I formed a poor impression of this "witness, who would appear to know very little of the business "or how the financial part of it was conducted." He concluded his judgment by saying—"The plaintiff as a witness created "a very good impression on my mind, and I believe him when "he says a verbal agreement was entered into by the parties "to form a partnership commencing at the end of the financial

" year of 1935 ; this is supported by the books of the firm, the " letter and the return made by the principal partner (first " defendant) to the Deputy Commissioner of Income Tax. " The first defendant did not go into the witness box to deny " the partnership and I am satisfied from all the evidence " before me that a partnership did in fact exist between the " three parties ; that the partnership has not been dissolved, " and plaintiff is entitled to have the partnership dissolved, " the said dissolution to take place from the date of the service " of the writ on defendants and in case service was effected " at different dates on the two defendants, then from the " date of the last service. An account of the firm's profits " must be taken to ascertain plaintiff's share therein and " payment made to plaintiff of such share. Defendants to " pay the costs of this action assessed at thirty guineas."

The appellants appealed to the West African Court of Appeal and their appeal was dismissed.

Before their Lordships' Board, Mr. Pritt, for the appellants, contended that there were not concurrent findings of fact in this case. He based this contention on certain passages in the judgment of the Court of Appeal. That court reached its conclusion by a line of reasoning which may be open to criticism in some respects, but it is not necessary to examine its reasoning in detail, as their Lordships entirely agree with the conclusion at which the Court of Appeal arrived. Whether there are or are not concurrent findings of fact in this case, their Lordships can see no good reason why the decision of the trial judge should be disturbed. He arrived at clear and definite findings on questions of fact and there was ample evidence to support these findings. Mr. Pritt suggested that the case put forward by the respondent in his evidence differed from the case put forward in para. 1 of his statement of claim. It is true that the statement of claim refers to a verbal agreement of partnership " made in or about March, 1936 " whereas the respondent deposed to a verbal agreement made in December, 1935, for a partnership to commence after March 31, 1936, but in their Lordships' view this variation affords no good reason for disturbing the decision of the trial judge.

Mr. Pritt next submitted that, if a partnership ever existed, it was " an illegal partnership " because the partners never complied with the provisions of the Registration of Business Names Ordinance, 1926. He suggested that as a result of this the court could not, or should not, entertain a suit by one of the partners for dissolution of the partnership. It is the fact that the firm carried on business in the name of "S. Thomopulos" and the partners never supplied the registrar with the necessary statement leading to registration. Consequently the firm was never registered in the manner directed by the Ordinance. In their Lordships' view, however, this omission in no way prevents a partner from obtaining an order for dissolution of the firm. It is not suggested that the business operations of the firm were in themselves of an illegal nature, and the results of non-compliance with the Ordinance are set out in ss. 8 and 14 thereof. Section 8 provides for a monetary penalty, and s. 14 (so far as material) is as follows:—" 14. Where any firm or person required to " furnish a statement of particulars or of any change in " particulars makes default in so doing the rights of such " defaulter under or arising out of any contract made or " entered into by or on behalf of such defaulter in relation to " the business in respect of which particulars were required " at any time while he is in default shall not be enforceable " by action . . . . or otherwise.

" Provided that—

" (*a*) the defaulter may apply to the court for relief against " the disability imposed by this section, and the court, on being " satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other " grounds it is just and equitable to grant relief, may grant " such relief either generally or as respects any particular " contract and on such conditions as the court may impose." Their Lordships read s. 14 as referring only to claims made by the defaulting firm against third parties. They can find no provision in the Ordinance which affects the right of one partner in a firm, which has failed to comply with the Ordinance, to bring an action against his co-partners, and they see no reason why any such provision should be implied. Mr. Pritt was unable to cite any authority in support of his contention, and in their Lordships' view it cannot be supported. If this contention had been one of some weight, it would have been necessary to consider whether it would be right to allow it to be raised, for the first time, before their Lordships' Board. It was not put forward in the West African Court.

Mr. Pritt then submitted that if any partnership existed, it was a partnership at will, and was dissolved in the year 1942, whereas the writ in the action was not issued till May 25, 1943.

Their Lordships agree that the partnership proved was a partnership at will, but in their view there is no satisfactory evidence which establishes that on any date in the year 1942 any one of the partners gave to each of the other two notice to dissolve the existing partnership. Nor does it appear that the appellants argued in the courts in Africa in favour of a dissolution before service of the writ. It is, of course, well settled that service of a writ claiming dissolution operates as a dissolution of a partnership at will and in this, as in other matters, the trial judge arrived at the right decision.

Mr. Pritt finally suggested that the respondent might have received already more than his share of the profits. That is a matter with which their Lordships cannot deal, and on which they express no opinion. All questions of figures will be dealt with in the taking of the account which has been directed, and no order has yet been made as to the costs of taking that account. No doubt these costs will be dealt with in due course by the appropriate court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs of this appeal.

Solicitors for appellants: *H. C. Morris, Woolsey, Morris & Kennedy.*

Solicitors for respondent: *Halsey, Lightly & Hemsley.*

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[PRIVY COUNCIL.]

GEORGE CASSAR DESAIN . . . . APPELLANT;

AND

JAMES CASSAR DESAIN VIANI AND OTHERS . . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

Malta — Will — Primogenitura — Name clause — Construction — Modus — Contravention — Excusable error — Holder not guilty of culpa gravis—Undertaking as to future compliance—No forfeiture.

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* *Present:* LORD DU PARCQ, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

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The terms of a will of 1781 founding a primogenitura provided, inter alia, that " the holder of the said primogenitura . . . . shall " always bear the surname Cassar Desain, without the admixture " of any other surname . . . . on pain of forfeiture in the event " of contravention . . . ." The respondent, who succeeded to the primogenitura in 1927, bore the surname Cassar Desain, but at least from 1931 he had also used the surname Viani, styling himself on occasion Cassar Desain Viani. On a claim by the appellant, a younger brother of the respondent, that the respondent had incurred forfeiture and that he (the appellant) was entitled to the primogenitura as the person nearest in the vocation at the moment when forfeiture was thus incurred :

Held, that the clause must be read and construed in the light of the common law of Malta—which is Roman law, based primarily on the laws of Justinian as subsequently developed by the interpretation of civilian jurists—under which it has come to be regarded as a general rule, hardly, if at all, subject to exception, that where, as in the present case, an obligation is imposed which is to be fulfilled on pain of forfeiture, after acquisition of the property, it must be construed as a modus and not as a resolutive condition. Even though a contravention is in fact proved, the court has a discretion, if the contravention does not involve culpa gravis, to give the offender an opportunity of undertaking to comply strictly in future with the terms of the modus and thus avoid forfeiture. There was in the present case sufficient evidence to support the finding of the trial court that the respondent had acted in error, was not guilty of culpa gravis and that his error was excusable. Where, therefore, the respondent, in compliance with an opportunity afforded by the trial court, had formally undertaken by note filed in the Record " never more to bear the name of Viani together with the name of " Cassar Desain," he had avoided forfeiture.

Desain (*Marquis*) v. *Viani* [1925] A. C. 416, at 435, referred to.

Caruana v. *Strickland* (1902) Collection of Maltese Judgments, vol. 18, Pt. II, p. 106, approved.

Judgment of the Court of Appeal of Malta affirmed.

APPEAL (No. 76 of 1946) from a judgment of the Court of Appeal of Malta (June 25, 1945) which had affirmed the judgment of the Civil Court of Malta, First Hall (May 6, 1944).

The following facts are taken from the judgment of the Judicial Committee. The appellant and the first-named respondent (hereinafter referred to as " the respondent ") were brothers. They were now the only surviving sons of the Marchese Giorgio Riccardo Cassar Desain, who died on July 21, 1927. A third son, Filippo, survived his father by one day. Of the three sons the respondent was the eldest and the appellant the youngest. Their father, the late Marchese, had succeeded to a primogenitura which was founded in 1781 by the will of the Noble Dr. Gio Batta Cassar in favour of the lawful male line descending from the Noble Salvatore Testaferrata, who was designated as universal heir to the whole of the testator's hereditary immovable property. The will made provision for the succession in the event of the failure of male issue of the heir or of his male descendants. The property was to descend in accordance with the rules laid down by the will "in perpetuity"—a direction which was valid in 1781, though after 1784, the date of the Code of Rohan, no primogenitura could be instituted so as to extend beyond the fourth degree or "grado."

The Noble Salvatore Testaferrata died without issue. The question of the succession then came before the Civil Court, and on February 25, 1848, it was adjudged that Filippo Giacomo Testaferrata should succeed him. From then onwards the successors to the primogenitura had borne the surname of Cassar Desain in accordance with a clause in the will the construction and effect of which formed the subject of the present dispute. The agreed translation of that clause was as follows: "I will then and expressly ordain that the holder of "the said primogenitura, founded by me as above, shall always "bear the surname Cassar Desain, without the admixture of "any other surname, and that he shall, at the same time, "make use of the coat-of-arms of the same family of Cassar "Desain, on pain of forfeiture in the event of contravention; "and, in that case, it is my will that, from that moment, he "who should succeed as above after the death of the contravener, "shall succeed to the said primogenitura; and not otherwise."

The respondent, having succeeded to the primogenitura on his father's death in 1927, had borne the surname Cassar Desain, but at least from the year 1931 he also used the surname Viani, styling himself on occasion Cassar Desain Viani. The temptation to do so was no doubt strong, since he claimed to be entitled, owing to the untimely death of his brother Filippo, to a second primogenitura, the holder of which was required to bear the surname Viani in addition to his own. A question had been raised by the appellant as to the respondent's alleged right to yet a third primogenitura, that associated with the name Testaferrata, but that was a matter which had no direct relevance to the present appeal. On August 13, 1934, the appellant filed a protest in His Majesty's Civil Court (First Hall), alleging that the respondent had "for a period of over "six years . . . . added the name Viani to that of Cassar

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"Desain." The appellant then claimed to be entitled to the primogenitura, on the ground that the respondent had "incurred forfeiture six years ago" and that at the moment when forfeiture was thus incurred the appellant was the person nearest in the vocation. No further step was taken until the action which culminated in the present appeal was begun by the appellant's libel, dated September 4, 1942. The libel repeated the allegation and the claim contained in the protest. The respondent, by his answer, denied the appellant's right to bring the action, and pleaded that "forfeiture of the primogenitura "does not occur ipso jure, but in pursuance of a court judgment, "especially when the prohibition that had given rise to the "claim for forfeiture was not a condition but simply 'modus'." The respondent was entitled (he said) "to justify his actions, "and to obtain from the court, if necessary, a period of time "within which to conform to the terms of the foundation."

Before the action came to trial it was ordered, at the instance of the appellant, that the two minor children of the respondent, as well as any male children who might yet be born to the respondent, should be called as parties to the suit, and the mother of the minors, the Marchesa Evelyn Cassar Desain, was duly appointed to represent them as curatrix. The Marchesa and the two minor children were also respondents in this appeal.

In the First Hall of His Majesty's Civil Court, the learned judge, Montanaro Gauci J., after hearing the evidence of the respondent, held that the appellant, being "within the vocation," was entitled to bring the respondent's failure to observe the terms of the founder's disposition to the notice of the court. He further held that the respondent had acted in error, that he was not guilty of culpa gravis, and that his error was excusable. He had therefore not forfeited the primogenitura, but it was adjudged that he should incur forfeiture thereof if, within one month after the judgment became res judicata, he failed "to declare and formally to undertake, by Note filed in the "Record, never more to bear the name Viani together with the "name Cassar Desain, whether in public or in private." The court went on to order that in the event of such forfeiture the primogenitura was to devolve on the respondent's eldest son. The Court of Appeal (Borg C.J., Ganado and Camilleri JJ.) dismissed the appeal which was brought against that judgment by the present appellant, and affirmed the judgment of the First Hall. Thereafter, on July 23, 1945, the respondent made

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the declaration and gave the undertaking required to avoid forfeiture. The judgment of the First Hall appeared to have been regarded as having "become res judicata" on its affirmation by the Court of Appeal, and it had not been suggested that the declaration was made out of time. The appellant had now brought a further appeal to His Majesty in Council.

1947. June 30; July 1, 2, 3. *O'Sullivan K.C.* and *W. D. Roberts* for the appellant. The authorities relied on in the courts in Malta to sustain the argument that the disposition in issue is a modus and not a resolutive condition and that therefore the court will only ordain forfeiture where there is culpa gravis on the part of the holder are mere text-book writers. Sohm, "Institutes of Roman Law," 3rd ed., p. 215; Buckland, "Text-Book of Roman Law"; and Roby, "Roman Private "Law" show that a term is only a modus when the property has to be devoted to some specified purpose. The authority of Fierli, "Celebriorum Doctorum Theoricæ," was applied for the first time in *Caruana* v. *Strickland* (1), and is not to be relied on. Desiring immediate forfeiture in the event of contravention, the testator could not have worded the testament in any other way: Voet "Commentarius ad Pandectas," 6th ed., 1734, vol. 2., p. 472, sub. div. 12; Peregrinus, "De Fidei-"commissis," 1598 ed., p. 101, sub. div. 121. The testator used the expression "from that moment" or "fin d'allora," which can be translated into Latin as "ex tunc," and that can have only one meaning—that the respondent forfeited at the moment of contravention, and that his brother, the appellant, there and then became entitled as next in vocation. This view is supported by the authority of the Roman Rota: Coram Corrado "Fideicommissi de Barberiis," 5th Dec. 1650, part XI, and Coram Taja "Primogenitura de Medico," June 22, 1674, part XV. The children of the respondent were not born at the moment of contravention and therefore have no claim: "Verior opinio est quod in fideicommissis conditionalibus "non admittuntur nisi illi, qui sunt nati vel concepti tempore "purificatæ conditionis," Coram Taja. Even if they were right in holding that the term was a modus, the courts in Malta were wrong in holding that the respondent was guilty only of excusable error: he himself admitted that he did not know whether he was doing right or wrong. The First Hall in Malta was ultra petita in calling the children of the respondent to the

(1) (1902) Collection of Maltese Judgments, vol. 18, Pt. II., p. 106.

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suit. Their claim is no bar to the claim of the appellant: *Desain* (*Marquis*) v. *Viani* (1); Torre, "Variarum Juris "Quæstionum" (1705) Tom. I, tit. II, p. 465; Peregrinus, "De Fideicommissis," ed. 13a of 1725, art. 41, p. 576.

Colombos and *Grieve* for the respondents. The relevant disposition in the instrument of foundation is a modus and not a resolutive condition. Such a term is a modus when it falls to be fulfilled after entry into possession: Peregrinus, "De "Fideicommissis," 6th ed. (1603) art. XI, p. 100, para. 113. In case of doubt such a term is always to be construed as a modus: Peregrinus, op. cit. para. 114; Fierli, "Celebriorum "Doctorum Theoricæ," p. 18; Richeri, "Jurisprudentia "Universalis" (1817–29), vol. II, Num. 9227; Molina, "De Hispanorum Primogeniis" (1573) p. 326, num. 11; and "De Valentibus," "De Ultimus Voluntatibus," (1744), vol. II, part I, vol. XXVIII, et seq. Where such a term is a modus, forfeiture will only be ordered where the holder is guilty of culpa gravis: Fierli, op. cit. and Cardinal de Luca, "De "Legatis" (1734 ed.) disc., 29, No. 7. All these authorities, far from being mere text-book writers, are of very great weight. They are the "learned Doctors" whose commentaries on the Institutes are accepted as authoritative in Roman law countries. They were so accepted in *Caruana* v. *Strickland* (2), in which the decision of the First Hall on the point has hitherto been regarded as the law of Malta. The law of the Institutes has in the course of centuries, as was to be expected, been developed beyond recognition. The modern doctrine as to modus was already developed by the authorities quoted in the sixteenth and seventeenth centuries, and was upheld in the seventeenth century by the Rota: Coram Leone Verospio (1652) part XI, pp. 372–3, paras. 10 and 11 of the summarium; Coram Ottalora (1667), part XV., p. 132, para. 27, et seq. The cases referred to by the appellant are distinguishable. The claim of the appellant is in any case excluded by the second named respondents, the male issue of the first respondent: Torre, "De Successione in Majoratibus et Primogenituris Italiæ," vol. III, p. 192, No. 1; ib. vol. II, p. 387; Molina, op. cit., p. 4, No. 18—"Nascituri idem ius habent ad fideicommissum "quod iam nati"; De Valentibus, "De Ultimis Voluntatibus," tom. II, part. I. vot. XXVIII. This is consistent

(1) [1925] A. C. 416.

(2) (1902) Collection of Maltese Judgments, vol. 18, Pt. II, p. 106.

with the whole tenor of the instrument of foundation, for the primogeniture having made ingress into one line, is to remain in that line whilst there shall be males therein descending from a male or males descending from a female. The words "from "that moment" can only mean from the moment of forfeiture ordered by the court. A declaration or entry is necessary before a fideicommissum can vest in a person within the vocation: *Desain* (*Marquis*) v. *Viani* (1); Peregrinus, op. cit., p. 576; De Valentibus, op. cit., votum XXVIII. In this case the appellant made no declaration before 1934, when the respondent's daughter was already born, and so excluded him.

O'Sullivan K.C. replied.

Oct. 14. The judgment of their Lordships was delivered by LORD DU PARCQ, who stated the facts set out above, and continued: It was strongly urged on behalf of the appellant at their Lordships' Bar that the intention of the testator was plain and that the words of the material clause were free from ambiguity. The respondent, it was said, held the primogenitura subject to a condition, a breach of which must bring about immediate forfeiture. It was further contended that, as the appellant was nearest in the vocation at the date of the contravention and the forfeiture which immediate followed it, he was entitled to succeed. The courts of Malta had rejected these contentions. There is no doubt that the clause in question must be read and construed in the light of the common law of Malta, which is Roman law, based primarily on the laws of Justinian, but developed by the interpretation of civilian jurists into a system—the usus modernus juris Romani—which, perhaps, would have seemed strange in some of its aspects to the lawyers of Justinian's day. It must be borne in mind that the tradition of the Roman law has been to give great weight to the opinions of the learned. This tradition was followed in the fourteenth and fifteenth centuries when the Roman law was being re-fashioned, or, at any rate, adjusted to meet new conditions and problems: continental lawyers of that period, in the words of Sir William Holdsworth, "made their law "depend upon the common opinion of the legal profession to "be gathered principally from legal treatises." (Holdsworth's "History of English Law," vol. IV., p. 220.) It was the communis opinio which made the common law.

Their Lordships have considered the authorities on which the courts of Malta relied, and others to which their attention has been directed by counsel, and they are of opinion that the case has been decided on a correct view of the law. In Justinian's day the distinction between a condition and a modus was clearly defined. "Modus" meant "a qualification added to a gift "or testamentary disposition, whereby the person benefited is "required and bound to devote the property he receives, or "the value thereof, to a specified purpose." (Sohm's Institutes, translated by J. C. Ledlie, 3rd ed., at p. 215.) "The modus," says Professor Sohm, "has no 'real' effect on the right "conveyed; that is to say, it does not impress the right with a "particular character as against anyone that acquires it; "it does not encumber the right in the sense of making it "'defeasible'." Failure to perform the obligation imposed by a modus rendered the person in default liable to an action in personam: unlike the breach of a condition, it did not affect his title. Founding themselves on this distinction, the jurists of later days found a way of escape from the rigour of testamentary provisions which might press hardly on one who, through excusable error or perhaps mere inadvertence, had imperfectly performed, or had contravened, an obligation. On a strict reading of the testator's language it might appear that the heres had irremediably forfeited his inheritance. This might well be an injustice to him, and would often, moreover, in fact defeat the true intention of the testator, whose paramount object might be (as in the present case) that his property should remain in the hands of those descendants of the first heir whom he had designated. That object would be frustrated if the property were taken away (as it might be) from that branch of the family which he especially favoured by reason of some trivial, or at least excusable, lapse. The doctrine which enabled the courts to avoid so harsh and unsatisfactory a result from necessarily following the use of such language as that employed by the testator in this case is commonly known as the doctrine of Aretinus, and owes its origin to Angelus Aretinus (or Angelo Aretino) who taught law at Bologna and Ferrara in the fifteenth century, and is described as "eximius juris consultus sæculi XV" in Fierli's "Cele-"briorum Doctorum Theoricæ," published in Rome in the year 1840 (at p. 18). The doctrine was generally accepted, and was expounded and developed by later commentators and in decisions of the Rota Romana and other courts. It was well established as a guiding principle of construction at the

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date of the foundation of the Cassar Desain primogenitura, and, in the form which it had then assumed, it may be stated as follows: The distinction between a modus and a conditio suspensiva is plain. If it be laid down in a will or other disposition that the heres or other successor to property is to enter on the enjoyment of it only after he has fulfilled some obligation, then he can never acquire the property until he has fulfilled that obligation. The term cannot be construed as a modus, and there is no question of a penalty. The heres is not subject to the penalty of forfeiture because he cannot forfeit that which has never been his. Where, however, the obligation is to be performed after the acquisition of the property, the case is less simple. On a strictly literal construction the words of the instrument may provide for immediate forfeiture on failure to fulfil a resolutive condition (conditio resolutiva). But the law leans against such forfeitures, regarding them as odious and likely to produce a result contrary to the true intention of the testator. It will therefore be presumed, whenever an obligation is imposed to be performed after, and not before, the acquisition of the property, that the provision is to be read as a modus. This presumption (præsumptio juris) holds even if it be expressly laid down that on a breach by non-fulfilment there is to be a forfeiture. The clause will then be read as a modus with a penalty (pœna) annexed. Now a pœna can only be enforced after an application to the court and a formal judgment, and the court, when once the matter is before it, must decide first whether there has been a contravention, and next, if a contravention is proved, whether the circumstances are such that the defaulter, instead of being immediately dispossessed, should be permitted to retain the property if he gives an undertaking strictly to observe the obligation in future, the court ordering that he shall suffer the penalty of forfeiture if he fails to give the required undertaking within a prescribed time. Such an order will always be made when the contravention is excusable. It will be excusable if there has not been culpa gravis on the part of the defaulter, and should certainly be excused when it is the result of error, when, for instance, there has been a mistake as to the meaning of the clause or the extent of the obligation.

In so stating the doctrine, their Lordships accept as correct its exposition by De Valentibus in the 2nd volume, part. I, votum XXVIII, of his work "De ultimis voluntatibus," published in 1744. This is a book of authority, and was so

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regarded by this Board in an appeal in which the title to the Viani primogenitura was in question: *Desain* (*Marquis*) v. *Viani* (1). In the passage to which their Lordships now refer the learned author was stating his opinion on a case in which a testator had instituted a fideicommissum in favour of one F. B. and his sons, grandsons and great-grandsons in the male line, with a provision that on failure of the male line the female line should be substituted. The founder had expressly directed that within a month after taking his inheritance any "heres "substitutus" was to assume the name and arms of the testator's family "absque alia mixtione," and that, should any such heres fail to comply with this direction, there should be substituted for him the person who would succeed him on an intestacy. There was alleged to have been such a failure. De Valentibus advised on all the aspects of the question which then arose, and thus part of his opinion is directly relevant to the present case. De Valentibus was of opinion that the testator's direction must be construed as a modus even though a time had been fixed within which the obligation must be performed. He quotes Aretinus to show that the forfeiture imposed is to be regarded as a penalty: "Si institutio est "pura, et postea injungitur aliquod onus heredi, si illud non "impleat, privetur relicto, tunc ademptio dicitur in pœnam "contraventionis, et legatum est pœnale." In the case of a modus as opposed to a conditio suspensiva (says De Valentibus), if the hereditas is to be forfeited for its non-fulfilment ("ob non implementum adimatur") then "ademp-"tio per viam pœnæ fieri dicitur," with the result that before effect can be given to the declaration of forfeiture the court must be moved—"ideoque, ut illi locus esse queat, semper "requiritur interpellatio, juxta in subjecta materia nota juris "principia." The penalty of forfeiture will not be imposed in a case such as he is considering unless the offence is grave and no reasonable excuse can be advanced: "Contraventio in "armorum assumptione tunc demum præjudicat, quum "speciem habet delicti, nullaque justa ratione excusari potest, "ita quidem, ut nec etiam excusari possit sub obtentu erroris, "qui semper adesse præsumitur, quando persona ad onus "obligata contrarium juste credere potuit; error, inquam, "excusat a caducitate." The offender, according to well-known and elementary principles ("familiares regulæ, quibus "edocemur"), ought to be warned by the court and required

(1) [1925] A. C. 416, 435.

in future to observe the provisions of the will strictly—" ita " quidem, ut caducitatem omnem effugiat declarando se " paratum esse obsequi voluntati testatoris."

It will be seen that De Valentibus professed to be stating familiar rules, and authorities to which their Lordships were referred bear him out. It had come to be regarded as a general rule, hardly (if at all) subject to exception, that where an obligation was imposed which was to be fulfilled, on pain of forfeiture, after acquisition of the property, it must be construed as a modus. This is illustrated by a judgment of the Rota Romana in 1667 (S. R. R., Decis. CII., at p. 132, coram R. P. D. Ottalora), in which it is said " Onus a testatore post heredis " institutionem injunctum semper per viam modi, non autem " conditionem, adjectum fuisse censetur." Thus what might be regarded as a conditio resolutiva is effective only as a modus —a conclusion tersely expressed by the Rota in the words " Conditio resolutiva et modus idem sunt."

The view of the law which their Lordships have now stated has been previously adopted in Malta. In *Caruana* v. *Strickland* (1), which was decided in 1902, it was held in the Civil Court (First Hall) " that according to the doctrine of the best " authorities when the disposition imposes on the devisee a " burden which, according to the mind of the devisor, is to be " fulfilled after the devisee has accepted the disposition and " received the emolument, then such disposition is held as made " sub modo and not sub conditione, although the words used " point to a condition." Their Lordships were furnished with a transcript of this judgment, which, they were informed, was affirmed by the Court of Appeal. It has been followed in the present case, and both it and the judgment now under review, in their Lordships' opinion, expound the law with substantial accuracy. Their Lordships think it well to state, however, for the guidance of the courts of Malta, that those courts are unlikely to derive assistance from English decisions as to " names and arms clauses " in wills or other dispositions. They observe that in *Caruana* v. *Strickland* (1) certain decisions of the English courts were cited, and were distinguished on the ground that they were given in cases in which the testator had fixed a time within which the duty imposed by him was to be fulfilled, and " had directed that on the lapse of such time the " party benefited should incur the loss of the property." " It is evident," said the learned judge, " that in such cases

(1) (1902) Collection of Maltese Judgments, vol. 18, Pt. II, p. 106.

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"the possessor forfeits his right by the effluxion of the time "itself, and hence there was no need that a time be fixed by the "court for such forfeiture." It is impossible to regard this distinction as satisfactory from the standpoint of English law, and it is questionable whether it ought to be regarded with any more favour according to the law of Malta. It was certainly the opinion of De Valentibus (as has been said above) that the fact that the testator has fixed a time within which the onus is to be fulfilled does not effect the general principle of construction. Their Lordships must add that they are not prepared, as at present advised, to approve the dictum of the Court of Appeal in the present case that "there can be no contra-"vention without dolus or at least culpa gravis." It is enough for the decision of this case and, in their Lordships' opinion, more accurate, to say that, even though a contravention is in fact proved, the court has a discretion, if the contravention does not involve culpa gravis, to give the offender an opportunity of undertaking to comply strictly in future with the terms of the modus, and thus to avoid forfeiture.

It is perhaps desirable, in order to avoid any misunderstanding, to emphasize the fact that it is only when there is added to an "institutio pura" an onus to be subsequently fulfilled that the præsumptio juris is operative. Another clause in the will now under consideration was referred to in the course of argument whereby the testator provided that if any holder of the primogenitura should commit any crime in respect of which he incurred the penalty of confiscation, he should, "ipso jure and ipso facto . . . . be and be deemed to be, "eight days before the commission of the crime, deprived and "excluded from the possession and enjoyment of the said "primogenitura." The only significance of this provision for the present purpose is that it is in striking contrast with the material clause. It imposes no onus, for even if the duty to abstain from crime could properly be described as an onus, it is not one which the testator imposes. There would be no ground for construing such a provision as a modus, nor could any contravention of it be considered excusable.

It remains to consider whether the appellant was right in contending that the judgment could not be supported on the particular facts of this case. It is manifest that what the law requires from the court is, first, a decision on the facts, and, secondly, the exercise of a discretion. The courts in Malta are in agreement both as to the facts and as to the way in

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which it was proper to exercise their discretion, and it would be contrary to their Lordships' practice to disturb a decision so arrived at if there is evidence to support the finding of fact and reasonable ground for the exercise of the discretion in the manner in which the court has thought fit to exercise it. It was forcibly contended by counsel for the appellant that there was no justification for the court's finding of excusable error. The only evidence before the court was that of the respondent, and the note of it in the Record is regrettably meagre. The respondent seems to have been frank in his admissions. He had been warned by his mother not to use the name of Viani, but he had done so. He had, however, consulted Professor Vassallo, who is described by the Court of Appeal as " one of " the leading advocates we have in Malta, who has done honour " to the profession to which he belongs," and (said the respondent) " Professor Vassallo told me ' you may use it '." No attempt was made at the Bar to justify this advice. There is nothing in the notes of evidence to indicate that the respondent was cross-examined either as to the circumstances in which the advice was given, or the reasons, if any, by which Professor Vassallo supported his alleged opinion. The advice appears to have been given orally, and may not have been correctly understood, or repeated, by the respondent. Their Lordships are bound to assume, however, that the learned judge sitting in the First Hall was satisfied that the respondent had believed that he was acting in conformity with Professor Vassallo's opinion.

The respondent further confessed that he had continued to bear the name Viani even after the serving of the protest on him in August, 1934, but he appears to have done so on the strength of Professor Vassallo's advice. At a later stage—apparently after proceedings were begun in earnest in 1942—the respondent, on the advice of the lawyers who were then acting for him, ceased to use the name Viani except, he said, when he was required to do so in certain transactions with the military authorities. Much stress was laid by the appellant's counsel on the expression used by the respondent when he said, according to the note, " after I was served with the protest, " not knowing whether I was doing right or not, I retained the " name." These words, taken by themselves, might be read as negativing innocent error. Their Lordships are, however, of opinion that, taking the very briefly recorded evidence as a whole, and remembering, as it is essential to remember, that the

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judge who tried the case was in the best position to assess the meaning and value of that evidence, there is sufficient ground for the finding that the respondent's fault may fairly be described as excusable error, so that culpa gravis ought not to be attributed to him. The appeal therefore fails.

As the respondent has now avoided a forfeiture by making the prescribed declaration, it is unnecessary to decide whether the courts in Malta were right in holding that the respondent's eldest son ought to succeed him if he incurred a forfeiture in pursuance of the judgment. Their Lordships therefore refrain from expressing a concluded opinion on that question, but they are certainly not disposed, as at present advised, to disapprove the view taken by the courts in Malta on this part of the case.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs of the appeal.

Solicitors for appellant: *Slaughter & May.*
Solicitors for respondents: *Barrow, Rogers & Nevill.*

Applied. Re COATS' TRUSTS. [1948] 1 All E.R. 521.

[HOUSE OF LORDS.]

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Feb. 25, 27; 28; *March* 3, 4; *July* 2.

NATIONAL ANTI-VIVISECTION SOCIETY . . . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Charity — Revenue — Income tax — Exemption of charities—Body "established for charitable purposes only"—Abolition of vivisection —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37, *sub-s.* 1 (*b*).

A society having as its object the total suppression of vivisection is not "a body of persons . . . . established for charitable "purposes only," within s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, so as to be exempt from income tax (*a*) because any assumed public benefit in the advancement of morals would be far outweighed by the detriment to medical science and research and consequently to public health, and (*b*) because a main object of the society was political in the promotion of legislation.

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* *Present:* VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD SIMONDS and LORD NORMAND.

So *held* by Viscount Simon, Lord Wright, Lord Simonds and Lord Normand, Lord Porter dissenting.

In re Foveaux [1895] 2 Ch. 501 overruled.

Decision of the Court of Appeal (sub nom. *Inland Revenue Commissioners* v. *National Anti-Vivisection Society*) [1946] K. B. 185 affirmed.

APPEAL from the Court of Appeal (MacKinnon and Tucker L.JJ., Lord Greene M.R. dissenting).

The society claimed exemption from income tax on investment income aggregating 2,875*l.* 15*s.* 7*d.* for the year ended April 5, 1943, on the ground that they were a body of persons established for charitable purposes only. The trust purposes were to be found in resolutions passed by a general meeting of the society held on July 31, 1897, and by the council on February 9, 1898. These were set out in the book of rules. The commissioners for the special purposes of the Income Tax Acts gave their decision on December 29, 1943, in the following terms: " In this case the society claim exemption from income " tax under s. 37 of the Income Tax Act, 1918, on the ground " that it is a body of persons established for charitable purposes " only. The object of the society, as set out in its book of rules is " stated to be ' to awaken the conscience of mankind to the " ' iniquity of torturing animals for any purpose whatever; " ' to draw public attention to the impossibility of any adequate " ' protection from torture being afforded to animals under the " ' present law; and so to lead the people of this country to " ' call upon Parliament totally to suppress the practice of " ' vivisection.' An explanatory resolution was passed by the " council of the society on February 9, 1898, in the following " terms: ' The council affirm that, while the demand for the " ' total abolition of vivisection will ever remain the object of " ' the National Anti-Vivisection Society the society is not " ' thereby precluded from making efforts in Parliament for " ' lesser measures having for their object the saving of animals " ' from scientific torture.' The quotations set out above are " taken from the book of rules of the society as reprinted in " 1938. We are satisfied that the main object of the society is " the total abolition of vivisection including in that term all " experiments on living animals whether calculated to inflict " pain or not and (for that purpose) the repeal of the Cruelty to " Animals Act, 1876, and the substitution of a new enactment " prohibiting vivisection altogether. Dr. Fielding-Ould in his " evidence before us suggested that there were some experi-

"ments on living animals to which the society did not object "and that the society was only opposed to such experiments "as caused pain and suffering to the animals, but we find it "difficult to reconcile this evidence with the statements "contained in the literature produced by the society, or indeed "with the speeches of Dr. Fielding-Ould, as reported in 'The "'Animals' Defender' a paper of which he is the editor. "We are satisfied that the members of the society are actuated "by an intense love of animals, and that the work of the society "is to a large extent directed towards the prevention of cruelty "to animals. Part of its propaganda literature is directed "towards inculcating a love of animals in the young. A number "of very distinguished men were called as witnesses by the "Crown with the object of proving the great benefits which had "accrued to the public by reason of the medical and scientific "knowledge which had been obtained through experiments on "living animals. We think it has been proved conclusively "that: (A) a large amount of present-day medical and scientific "knowledge is due to experiments on living animals; (B) many "valuable cures for and preventatives of disease have been "discovered and perfected by means of experiments on living "animals and much suffering both to human beings and to "animals has been either prevented or alleviated thereby. "We are satisfied that if experiments on living animals were "to be forbidden (i.e., if vivisection were abolished) a very "serious obstacle would be placed in the way of obtaining "further medical and scientific knowledge calculated to be of "benefit to the public. We were very impressed by the evi-"dence of Major-General Poole, Director of Pathology at the "War Office, as to the great value of experiments on living "animals in connexion with the successful carrying on of the "present war by the maintenance of the health of the troops "and the avoidance or minimizing of many diseases to which "soldiers in the field are particularly liable. There was no "express evidence before us that any public benefit in the "direction of the advancement of morals and education "amongst men (or in any other direction) would or might "result from the society's efforts to abolish vivisection, but if it "must be assumed that some such benefit would or might so "result, and if we conceived it to be our function to determine "the case on the footing of weighing against that assumed bene-"fit the evidence given before us, and of forming a conclusion "whether, on balance, the object of the society was for the

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"public benefit, we should hold, on that evidence, that any "assumed public benefit in the direction of the advancement of "morals and education was far outweighed by the detriment "to medical science and research and consequently to the public "health which would result if the society succeeded in achieving "its object, and that on balance, the object of the society, so "far from being for the public benefit, was gravely injurious "thereto, with the result that the society could not be "regarded as a charity. But, upon the authorities, we regard "ourselves as precluded from so holding. In 1895 the society "was held to be a charity within the legal definition of the "word 'charity' (see *In re Foveaux* (1)). Certain passages in "the judgment of Chitty J. have been commented upon in "*In re Hummeltenberg* (2), and in the case of *In re Grove-Grady* (3) Russell L.J. stated as follows: 'For instance, "'anti-vivisection societies, which were held to be charities by "'Chitty J. in *In re Foveaux* (1), and were described by him "'as near the border line, might possibly in the light of later "'knowledge in regard to the benefits accruing to mankind "'from vivisection be held not to be charities.' *In re* "*Foveaux* (1) has not been overruled and it was certainly "approved by the Court of Appeal in *In re Wedgwood* (4) "(see especially the judgment of Swinfen Eady L.J.). In "these circumstances we have come to the conclusion that so "far as we are concerned we are bound by the authorities to "hold that the society is a body of persons established for "charitable purposes only and entitled to exemption from "income tax under s. 37 of the Income Tax Act, 1918. "It remains for us to deal with the Crown's argument that as "the alteration of the law by means of legislation was a main "purpose of the society its claim to be a charity must fail. "In support of this argument the Crown relied upon the case of "*Inland Revenue Commissioners* v. *Temperance Council of the* "*Christian Churches of England and Wales* (5). We agree that "the alteration of the law by means of legislation is a main "purpose of the society but the repeal of the Act of Parliament "(i.e., 39 & 40 Vic., c. 77) was undoubtedly part of the society's "object in 1895 when *In re Foveaux* (1) was decided and "Chitty J. refers to this in his judgment. It would seem to "follow that Chitty J. considered legislation only came in in

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(1) [1895] 2 Ch. 501.
(2) [1923] 1 Ch. 237.
(3) [1929] 1 Ch. 557, 582.
(4) [1915] 1 Ch. 113, 122.
(5) (1926) 136 L. T. 27.

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"a subsidiary way (see Rowlatt J. (1)). We therefore feel "bound to reject the argument and allow the society's claim." From this decision the Crown appealed to Macnaghten J., who reversed it, holding that the society was not a body of persons established for charitable purposes only. His judgment was upheld by the Court of Appeal (MacKinnon and Tucker L.JJ., Lord Greene M.R. dissenting) (2). The society appealed to the House of Lords.

Grant K.C., *Sir Valentine Holmes* K.C. and *Senter* for the society. The society is a body of persons established for charitable purposes only and its income is applicable to and is applied to charitable purposes only. *In re Foveaux* (3) was rightly decided. It applies to the present case and ought to be followed. There the judge rightly held that the society's purpose was productive of moral benefit to the community. Trusts for the benefit and protection of animals are beneficial to the community because kindness to them produces moral benefits as tending to promote feelings of humanity and thus to elevate the human race. Thus humanity benefits from whatever benefits domestic or non-noxious animals. The Crown suggests that the material or physical benefits of modern research on balance outweigh these moral benefits but the court cannot go into such a question of comparison of quantum of benefit. It cannot weigh the moral benefits resulting from the society's purpose against material benefits derived from vivisection, since any conclusion so reached must be merely the personal opinion of the judge as an individual and cannot be a judicial opinion based on evidence. This is a moral question and the court cannot weigh one moral benefit against another or examine a conflict between one ethical outlook and another. [They referred to Dr. Hastings Rashdall's The Theory of Good and Evil, vol. II, p. 441.] In this conflict the Crown begs the question by answering the moral question in favour of its own contention. Thus, once it is established that a gift is for the advancement of religion or of education or for the relief of poverty, it falls within one of the heads of classification of charitable purposes and cannot be held not to be charitable on the ground that it will or may produce consequential disadvantages or evils: see *Income Tax Commissioners* v. *Pemsel* (4). In the case of a religious object adherents of other religions cannot come to the court and contend that that religion does more harm than good, for the region of relative ethics is one into which the court cannot enter. The same principle applies to purposes (of which the purpose of the society is one) which produce a benefit to the community and therefore, apart from any consequential disadvantages or evils which they may produce, are charitable. The purpose of the society does not cease to be beneficial to the community even if the full achievement of that purpose would deprive mankind of certain consequential benefits. Even proof that material benefits were derived from vivisection and that physical evils would result if it were stopped does not destroy or displace the moral benefit to the community which results from the society's purpose. Different people are aiming at the public good in different ways and it may be that the Medical Research Council which admits vivisection is also a charity. One may hold an object to be charitable although one does not approve of it oneself. In *In re Foveaux* (1) the judge, though he knew of the Report of the Royal Commission on Vivisection in 1876 (Cmd. 1397) stood neutral. That decision should stand. The observations on it by Russell L.J. in *In re Grove-Grady* (2) were obiter dicta and should not be followed. Neither in that case nor in any other relied on by the respondents was there any question of weighing the benefits to the community of an alleged charity against supposed consequential harm. The decision in that case was that the trust was not for the benefit of animals and that no benefit to the community could flow from it. *In re Hummeltenberg* (3) is distinguishable and does not touch *In re Foveaux* (1). *In re Cranston* (4) supports the society's contentions. [They referred to *In re Wedgwood* (5); *London University* v. *Yarrow* (6); *In re Douglas* (7); *Marsh* v. *Means* (8); *Armstrong* v. *Reeves* (9) and *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (10).] Further, the fact that an Act of Parliament has already dealt with the matter does not render the objects of the society the less charitable: see Protection of Animals Act, 1911. So far as the society is seeking to alter the law its object is to secure the abolition of vivisection; the ultimate object is charitable and the incidental political means to be adopted do not vitiate it. [They referred to *Inland Revenue Commissioners* v. *Temperance Council of the Christian Churches of England and Wales* (1); *De Themmines* v. *De Bonneval* (2) and *In re Hood* (3).]

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(1) 136 L. T. 28.

(2) [1946] K. B. 185.

(3) [1895] 2 Ch. 501.

(4) [1891] A. C. 531.

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(1) [1895] 2 Ch. 501.
(2) [1929] 1 Ch. 557, 582.
(3) [1923] 1 Ch. 237.
(4) [1898] 1 I. R. 431.
(5) [1915] 1 Ch. 113.
(6) (1857) 1 De G. & J. 72.
(7) (1887) 35 Ch. D. 472.
(8) (1857) 3 Jur. N. S. 790.
(9) (1890) 25 L. R. Ir. 325.
(10) [1928] 1 K. B. 611.

Sir Hartley Shawcross A.-G., Jenkins K.C., J. H. Stamp and *R. Hills* for the Crown. The society is not established for charitable purposes only. The object of the society being the total prohibition of vivisection which at present is authorized and controlled by the Cruelty to Animals Act, 1876, the repeal of that Act and the replacement of it by another statute is a political object such as cannot in law constitute a charitable object. The *object* of the society is legislation; the *result* would be the abolition of vivisection; the *motive* is the prevention of cruelty to animals. Controversial matters pertaining to government are excluded from the scope of charities. Save where the objects include the passing of an enabling Act ancillary to the achievement of non-controversial purposes, no trust aiming at a change of the law can be charitable; in the present case the political object is not ancillary. If it were otherwise, party funds would be charitable as would a trust to protect people from starvation by means of protective tariffs. The difference between voluntary persuasion and coercion is crucial. The promotion of legislation involving compulsion as regards a particular course of conduct at the time not obligatory or prohibition of something at the time lawful would be political and could never be a charitable object. If the objects of a society are both conversion and legislation then, as the funds could be employed on either purpose, there would be no charitable trust, unless possibly the legislation were quite ancillary. Thus, theoretically, a society to persuade persons conducting experiments not to practise vivisection might be charitable but not a society aiming at legislation in the matter. A trust to abolish divorce, though that is a religious object, would be acutely controversial and would require legislation to achieve its object and so could not be charitable. Again, while a trust to build churches would be charitable, a trust to promote legislation to have churches built and to compel persons to go to them would not be so. A trust to redeem slaves would be charitable but not to promote legislation for the abolition of slavery. A trust to promote abstinence from intoxicating liquor would be charitable but not one to promote prohibition

(1) 136 L. T. 27.
(2) (1828) 5 Russ. 288.
(3) [1931] 1 Ch. 240.

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by legislation. If the objects of a society included both conversion and legislation, then, since the funds could be expended on either purpose, there would be no charitable trust. [They referred to *Bowman* v. *Secular Society, Ld.* (1); *In re Tetley* (2); *Attorney-General* v. *National Provincial and Union Bank of England* (3); *Blair* v. *Duncan* (4); *In re Macduff* (5); *Voluntary Workers' Role Trustees* v. *Inland Revenue Commissioners* (6) and *Bonar Law Memorial Trust* v. *Inland Revenue Commissioners* (7).] Further, on the facts, the aims of the society are not for the benefit of the public but are inimical to it. To be charitable a trust must be for the benefit of the community. It is because it is for the public benefit that a charitable trust may be a perpetuity which a private trust may not. A trust which, on the evidence, is injurious to the community, cannot be charitable. It cannot be for the public benefit to expose a great number of human beings and animals to grievous suffering and in many cases to painful and premature death by exempting a smaller number of animals from the humanely regulated and limited suffering associated with the practice of vivisection. The object of the society is the total abolition of vivisection, not the prevention of cruelty to animals, which is only the motive. It is no more charitable than a trust to prohibit the wearing of leather shoes with the motive of preventing cruelty in killing and skinning animals. Public benefit is essential to a charitable trust, not necessarily public purposes for it is not all public purposes that are charitable. Not all education would be charitable, e.g., the education of Fascists. Not all religious trusts would be charitable, e.g., trusts for devil worship and the Black Mass. A trust to provide a bounty for any young women who had at least three illegitimate children or a trust for the relief of persons who were poor because they would not work or impoverished as a result of having made themselves liable to fines would not be charitable (see *Thrupp* v. *Collett* (8)). In all such cases the court would have to look at the matter in the light of public policy. The whole terms and effect of the particular trust have to be considered and if its object involves consequences which, when duly weighed by the appropriate tribunal are found

(1) [1917] A. C. 406, 442.
(2) [1923] 1 Ch. 258.
(3) [1924] A. C. 262, 266.
(4) [1902] A. C. 37.
(5) [1896] 2 Ch. 451.
(6) 1942 S. C. 47; 24 Tax Cas. 320.
(7) (1933) 17 Tax Cas. 508.
(8) (1858) 26 Beav. 125.

injurious to the community, the trust cannot be charitable. The standard is a fluctuating one. For example, at one time a trust for the suppression of witchcraft might have been held charitable on religious grounds. It is not asserted that majorities are always right but minorities are not to be accorded special privileges which the majority may not hold to be for the public benefit. Persons may hold or teach unorthodox views but they are not to have special privileges for that purpose at the public expense. The court must look at all the considerations material and moral and reach a conclusion on the whole matter. The proposition is simple, though its application may be hard. The function of the court is to determine on the evidence what is the common understanding on the matter under the particular ethical code accepted in this country: see *In re Cranston* (1) and *Ford* v. *Wiley* (2). There is no question of balancing moral against material considerations or different moral considerations against each other, since there is no authority for dividing the effects on the public into watertight compartments moral and material. For example, it would not be open to a donor or to the court to bestow the cachet of charitable validity on a trust by saying that material welfare will be enhanced and therefore the moral result cannot counterbalance it, as in the trusts already instanced which would promote laziness or immorality. It is not possible to separate moral from material results giving preference to one rather than the other. The moral problem is: If a man can be saved by an experiment inflicting pain on an animal, should you save the man or spare the animal? The answer will depend on the particular ethical code applied and the circumstances in which the pain is inflicted, since the infliction of pain may be justified and is not necessarily cruel or evil. The christian ethic subordinates animals to the use of man, subject to a condemnation of cruelty. The real antithesis is between sentimentality and morality. On moral standards the question should be answered by saving the man. The moral rectitude is certainly not all on the side of the society, for the work of medical research is just as altruistic as anti-vivisection. The courts are constantly called on to judge moral questions. The matter is to be tested by them on the evidence available at the particular time and judged by current ethical standards. *In re Grove-Grady* (3) was rightly decided. A trust for the

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(1) [1898] 1 I. R. 431, 454, 457.

(2) (1889) 23 Q. B. D. 203, 209, 218.

(3) [1929] 1 Ch. 557, 572, 587–8.

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benefit of animals is only charitable if benefit to the community necessarily results. The special commissioners were not bound by *In re Foveaux* (1) and should have acted on their own view that the object of the society was not beneficial to the community. If the judge in that case had had before him evidence comparable to that now produced that the abolition of vivisection would be gravely detrimental to the community, he could not have held the trust charitable. [They also referred to *Attorney-General* v. *Whorwood* (2).]

Grant K.C. in reply. The real purpose of this society is not political; it is not to alter the law but to stop a particular practice by whatever means. *In re Tetley* (3); *Blair* v. *Duncan* (4) and *In re Macduff* (5) have nothing to do with this point on which there is no authority against the society. As to benefit to the community, the correctness of the decisions touching animal charities has not been challenged by the Crown, save in the case of *In re Foveaux* (1). The real problem is whether the good to the human race resulting from vivisection outweighs the evil of the practice. It is a moral problem which it is not for the court to solve. If rational persons can hold opposite views this must be a charity since it has been held in favour of the society in *In re Foveaux* (1) and *In re Wedgwood* (6) that the purpose of seeking to stop vivisection does produce a moral benefit. [He also referred to *Thornton* v. *Howe* (7) and *Income Tax Commissioners* v. *Pemsel* (8).]

THE HOUSE took time for consideration.

July 2. VISCOUNT SIMON. My Lords, in this very important and most difficult case, going as it does to the foundations of the conception of one kind of charitable trust, I have read and re-read the opinion which has been prepared by my noble and learned friend Lord Simonds. Notwithstanding views to a different effect which are to be found in the minority judgment of the Master of the Rolls in the Court of Appeal, and in another opinion about to be pronounced in this House, I cannot escape from the course of argument contained in Lord Simonds' opinion, or from the conclusion at which he arrives. I therefore move that this appeal be dismissed with costs.

(1) [1895] 2 Ch. 501.

(2) (1750) 1 Ves. Sen. 534.

(3) [1923] 1 Ch. 258.

(4) [1902] A. C. 37.

(5) [1896] 2 Ch. 451.

(6) [1915] 1 Ch. 113.

(7) (1862) 31 Beav. 14.

(8) [1891] A. C. 531, 573.

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LORD WRIGHT. My Lords, I think the first thing to examine is whether *In re Foveaux* (1) was rightly decided and whether the commissioners were justified in regarding themselves as bound by that authority. Before examining *In re Foveaux* (1) it will be convenient to bear in mind what is now generally accepted, that the question whether a gift or fund is charitable is a matter for the decision of the court on all the materials before it. "Charitable" in this context has reference to charitable in the legal sense. Charity indeed is here a word of art, of precise and technical meaning. From very early times the decision was the function of the court. Thus, rules grew around the very sketchy list in the statute of Elizabeth (43 Eliz. c. 4). Judicial precedents were established. An early attempt to simplify the problem by a classification under main heads was the summary under four heads submitted by Sir Samuel Romilly (then Mr. Romilly) arguing in *Morice* v. *Bishop of Durham* (2). These heads were, first, relief of the indigent, second, advancement of learning, third, the advancement of religion, fourth, which is the most difficult, the advancement of objects of general public utility. This classification substantially was adopted by Lord Macnaghten about eighty-five years later in his famous list of charitable purposes in *Income Tax Commissioners* v. *Pemsel* (3), which is too familiar to call for quotation here. The noble and learned Lord had emphasized that he was discussing the legal meaning of charity; like Sir Samuel Romilly he remarked on the distinction between the popular and the legal meaning of the word. It is not necessary at this time of day to observe that not every object which is beneficial to the community can be regarded as charitable. The legal significance is narrower than the popular. This was fully and explicitly held by this House in *Attorney-General* v. *National Provincial and Union Bank of England* (4), which followed *In re Macduff* (5), and was discussed more recently but more in relation to the construction of general words than to specific instances in *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson* (6) Even if the object were in some sense beneficial to the community, it would still be necessary to discover that it fell within the spirit and intendment of the instances given in the Statute of Elizabeth. Healthy and manly sports are certainly in fact

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(1) [1895] 2 Ch. 501.
(2) (1805) 10 Ves. 521.
(3) [1891] A. C. 531, 583.
(4) [1924] A. C. 262.
(5) [1896] 2 Ch. 451.
(6) [1944] A. C. 341.

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beneficial to the public, but apart from special concomitants are not generally entitled to qualify as charitable objects. On the other hand societies or institutes for scientific research would generally be charities as being for the benefit of mankind under the fourth head or alternatively as falling within the extended significance given to education or the advancement of learning, which includes, in modern times, science. Even societies coming within the first three heads of Lord Macnaghten's classification would not be entitled to rank as legal charities if it was seen that their objects were not for the public benefit. Where a society has a religious object it may fail to satisfy the test if it is unlawful and the test may vary from generation to generation as the law successively grows more tolerant. Lord Parker in *Bowman* v. *Secular Society, Ld.* (1), gives a long list illustrating this principle. It cannot be for the public benefit to favour trusts for objects contrary to the law. Again eleemosynary trusts may as economic ideas and conditions and ideas of social service change cease to be regarded as being for the benefit of the community. And trusts for the advancement of learning or education may fail to secure a place as charities, if it is seen that the learning or education is not of public value. The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears.

In re Foveaux (2) was decided in 1895 by Chitty J. The headnote is simply : " Societies for the suppression and abolition of vivisection are charities within the legal definition of " the term ' charity '." The particular societies in question were either the predecessors of the present appellant or were substantially identical for all relevant purposes. The object as stated by Chitty J. was the total suppression of the practice of vivisection. At the time when the decision was given an Act entitled the Cruelty to Animals Act, 1876, was in force ; that Act made it unlawful and an offence to perform on a living animal any experiment calculated to give pain except subject to the restrictions imposed by the Act. One provision was that the particular experiment was to be performed with a view to the advancement by new discovery of physiological knowledge or of knowledge which will be useful for saving or prolonging life or alleviating suffering. It was generally required by the Act that the animal should be under a sufficient

(1) [1917] A. C. 406, 448.

(2) [1895] 2 Ch. 501.

anæsthetic save in special circumstances, in which case a certificate was necessary under stringent conditions and experimenters were to hold a licence. This Act has remained in force since then. Its repeal is the main object of the appellant society. Chitty J. refers to the Act as being the subject of controversy between the supporters and opponents of the practice of vivisection. The former, he said (1), argue that the practice under carefully guarded provisions is justifiable because it tends to promote the welfare of the human race and even animals. The latter argue that the practice is really unjustifiable. The judge seemed disposed to regard the issue as depending on how the element of the improvement of morality was to be considered. But he had already accepted the position that the court does not enter into or pronounce any opinion on the merits of the controversy between these two sides. Though he knew of the Report of the Royal Commission on Vivisection, the court, he said (2), " stands neutral." Later, in his judgment, he said (3), that the intention is to benefit the community: whether, if they achieved their object, the community would, in fact, be benefited is a question on which the court is not required to express an opinion. Whatever else is clear, it is, I think, clear that the question he is proposing involves the balancing of utilities. I cannot understand how the judge could avoid deciding the very question necessary for his decision, viz., whether the society satisfies the fourth head, as being beneficial to the community. That I think is the test he proposes. He questions if the infliction of pain is necessarily cruelty. It may be justifiable he concedes, but that, he thinks, is a question of morals on which men's minds may differ. But he seems to conclude the matter by holding that the intention of the creator of the trust is to benefit the community. That he treats as decisive: he declines to determine whether the community would, in fact, be benefited. This judgment has stood since it was delivered. Though it has not been reversed it has been severely criticized by a great authority Lord Russell of Killowen, though by way of dictum and not decision. There have also been other judicial pronouncements which may have to be considered.

The earlier of the cases in which Russell J., as he then was, adverted to this question was in *In re Hummeltenberg* (4). The matter in that judgment most material to the discussion of

(1) [1895] 2 Ch. 501, 505.
(2) Ibid. 503.
(3) Ibid. 507.
(4) [1923] 1 Ch. 237.

Chitty J.'s judgment is shortly expressed in the headnote, "The opinion of the donor of a gift or the creator of a trust that "the gift or trust is for the public benefit does not make it so, "the matter is one to be determined by the court on the "evidence before it." Russell J. rejected the views expressed in *In re Cranston* (1) and by Chitty J. *In re Foveaux* (2). Russell J. clearly defined his opinion (3): "If a testator by stating or indicating his view that a "trust is beneficial to the public can establish that fact "beyond question, trusts might be established in perpetuity "for the promotion of all kinds of fantastic (though not "unlawful) objects, of which the training of poodles to dance "might be a mild example. In my opinion, the question "whether a gift is or may be operative for the public benefit "is a question to be answered by the court by forming an "opinion upon the evidence before it." In my judgment these observations correctly state the law. They were, in fact, adopted by the majority of the Court of Appeal in the next case I shall cite, which is an "animal" case; it is *In re Grove-Grady* (4). It is sufficient here to record that the purpose of the society contemplated by the trust was the acquisition of land for the provision of refuges for the preservation of "all animals "birds or other creatures not human." The principle of the decision was that there could not be a legal charitable trust unless its execution involved a benefit to the community. Hence a trust for the benefit of animals would not merely on that ground be charitable. There must be a further element, in particular that the discouragement of cruelty promotes humane sentiments in man towards the lower animals which involves moral benefit to the human community. Russell L.J., as he then was, reiterated the proposition that (5), "the court "must determine in each case whether the trusts are such that "benefit to the community must necessarily result from their "execution." He added significant words, "the authorities "have in my opinion, reached the furthest admissible point of "benevolence in construing, as charitable, gifts in favour of "animals, and for myself, I am not prepared to go any further." The same warning had perhaps been uttered by Lord Sterndale M.R. in *In re Tetley* (6). "I confess," he said "I find "considerable difficulty in understanding the exact reason why

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(1) [1898] 1 I. R. 431.
(2) [1895] 2 Ch. 501.
(3) [1923] 1 Ch. 237, 242.
(4) [1929] 1 Ch. 557.
(5) Ibid. 588.
(6) [1923] 1 Ch. 258, 266.

"a gift for the benefit of animals, and for the prevention of "cruelty to animals generally, should be a good charitable gift, "while a gift for philanthropic purposes, which, I take it, "is for the benefit of mankind generally, should be bad as a "charitable gift." Lord Sterndale M.R. agreed with the principles stated by Russell J. which formed the basis of the decision of the Court of Appeal. It is clear that *In re Grove-Grady* (1) was not inconsistent with the general view in favour of preventing cruelty to animals. The trust in that case did not ✓protect the weaker animals from the cruelty of the stronger and more savage, because the idea of the testatrix was to provide a sanctuary in which animals might be free from the danger of being shot or trapped or otherwise maltreated by human beings, though left at liberty to indulge their natural instincts of inherent cruelty against each other. *In re Wedgwood* (2) was discussed in that case. The trust there was to apply the fund for the protection and benefit of animals. It was held to be valid on the ground that it was calculated to promote public morality by checking the innate tendency to cruelty. Much that was said in that case clearly went too far. The emphasis of the actual decision however was that the moral benefit to mankind consisted in promoting feelings of kindness towards animals and thus promoting feelings of humanity and morality generally; the limitation of the doctrine to animals useful to man which was prominent in the earlier of the animal cases, *London University* v. *Yarrow* (3), was lost sight of or at least had fallen into the background, in view of the wider and less specific doctrine of moral improvement, which was held to satisfy the requirement of benefit to the community under the fourth head of Lord Macnaghten's classification, and was held to be present in *In re Wedgwood* (2) but absent in *In re Grove-Grady* (1).

I do not intend to make a complete anthology of the "animal" cases, but I must refer shortly to the most important of the Irish cases on gifts for the benefit of animals, namely, *In re Cranston* (4), a decision of the Irish Court of Appeal. There the bequest was in favour of a vegetarian society, whose purpose was to stop the killing of animals for food which was condemned as being inconsistent with the rights of animals and calculated to produce demoralizing effects upon men. The validity of the gift was upheld by the majority of the Irish Court of Appeal,

(1) [1929] 1 Ch. 557.
(2) [1915] 1 Ch. 113.
(3) 1 De G. & J. 72.
(4) [1898] 1 I. R. 431.

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largely for reasons taken to be derived from *In re Foveaux* (1). But a powerful dissenting judgment was delivered by Holmes L.J. (2): he was content indeed to distinguish in *In re Foveaux* (3): but he demanded to know if a belief by the promoters in the utility of their project to eliminate the use of animal food could make it a charity in any sense which the law attaches to that term. "If so," he said (3), "every project "not actually immoral or illegal must be held a charity." He enforced his opinion by giving instances of matters which might be conceived to be beneficent agencies by a few idealists or cranks.

The result so far has been that it is necessary for your Lordships to decide whether *In re Foveaux* (1) was rightly decided or perhaps more accurately whether the commissioners were right in thinking that it governed the case before them. No doubt Chitty J. had in the Report of the Royal Commission on Vivisection which was before him amply sufficient evidence of the utility of vivisection and hence of the mischief of any project aimed at making it unlawful. But it is not clear how far he had appreciated the full force of the evidence. The evidence now produced of the enormous advances in science and research which has been accepted by the commissioners in their findings of fact on the utility of vivisection is, indeed, such as no fair-minded man could refuse full credence. It is conclusive to my mind; besides the findings are binding on your Lordships. *In re Foveaux* (1) has been the subject of much discursive comment, but it has not been the subject of decision in this House until the present case. The fact that it has stood so long cannot bar this House from reversing it if your Lordships are satisfied that it is wrong. *Bourne* v. *Keane* (4) is sufficient authority as to the general powers of the House or as I should say its duty. One of the most important aspects of the judicial functions of this House is to harmonize or correct the decisions of the lower courts, even though as Lord Birkenhead L.C. said (5), it would be "overruling decisions which have been "treated as binding for generations." In my opinion *In re Foveaux* (1) was wrongly decided and should now be reversed. Chitty J. was wrong in taking the intention of the donor as a sufficient test that the gift was charitable. That is vital. He was wrong in holding that he could stand neutral and not decide, on the facts before him, the question whether the gift was for the public benefit. If he stood neutral he could not decide in favour of one side and against the other side. He was inconsistent in holding that the gift was charitable while at the same time refusing to decide whether it was for the public benefit: unless he so decided in favour of the gift he could not decide that it was charitable. If he was not satisfied that the propaganda and expenditure for the suppression of vivisection were beneficial to the community, he could not hold that the activities of the society were charitable. He was also wrong in deciding that he could not weigh against each other the detriment inseparable from suppressing vivisection on the one hand and on the other hand the benefit to the community of higher moral standards said to be due to enhanced regard for the well-being of animals. There is not, so far as I can see, any difficulty in weighing the relative value of what it called the material benefits of vivisection against the moral benefit which is alleged or assumed as possibly following from the success of the appellant's project. In any case the position must be judged as a whole. It is arbitrary and unreal to attempt to dissect the problem into what is said to be direct and what is said to be merely consequential. The whole complex of resulting circumstances of whatever kind must be foreseen or imagined in order to estimate whether the change advocated would or would not be beneficial to the community. The commissioners have abstained from any but the vaguest finding on the possibility of moral benefit: they had no evidence, they said, on the point. But at the highest the assumed or alleged benefit is indirect and problematical. There is clearly no general consensus of opinion or understanding against the practice of vivisection which has been permitted by Parliament as regulated under the Act of 1876. That Act has stood all these years substantially without any serious attack. It seems that people's moral feelings are not weakened nor their objections to cruelty to animals reduced by the existence of the Act. If they think about it at all they think of the immense and incalculable benefits which have resulted from vivisection: if that involves some measure of pain at times to some animals, notwithstanding the Act, they feel that it is due to a regrettable necessity. Similarly a man who has a beefsteak for dinner if he thinks at all about the slaughter of the beast reflects that that is inevitable in the present constitution of society. I do not question that a high degree of regard for animals is a good thing.

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(1) [1895] 2 Ch. 501.

(2) [1898] 1 I. R. 431, 452.

(3) Ibid. 457.

(4) [1919] A. C. 815.

(5) Ibid. 830.

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But it must be a regulated regard. Cruelty, that is purposeless cruelty, whether through brutality or through a purpose to satisfy our pleasure or our pride, cannot be forgiven. It is indeed also a penal offence at law. But it is impossible to apply the word cruelty to efforts of the high-minded scientists who have devoted themselves to vivisection experiments for the purpose of alleviating human suffering. Harvey was only able to publish in 1628 his great work, De motu cordis, because he had been given deer from the Royal Park for purposes of vivisection. Countless millions have benefited from that discovery. I do not minimize the sufferings of the unfortunate deer. The subject of vivisection is not a consenting party nor does it benefit. But I put against that the benefit to humanity. It has been argued that a court cannot weigh moral and material benefits against each other. This is not the place to accept or reject Bentham's pronouncement that " measure for " measure pushpin is as good as poetry " or debate whether utilitarian or intuitionist ethics is the truer theory. But in ordinary life people often have to decide between a moral and a material benefit. However I do not think that is a fair statement of the issue. The scientist who inflicts pain in the course of vivisection is fulfilling a moral duty to mankind which is higher in degree than the moralist or sentimentalist who thinks only of the animals. Nor do I agree that animals ought not to be sacrificed to man when necessary. A strictly regulated amount of pain to some hundreds of animals may save and avert incalculable suffering to innumerable millions of mankind. I cannot doubt what the moral choice should be. There is only one single issue.

I have great sympathy with much that the Master of the Rolls has said in his powerful dissenting judgment. I have a great love for animals and some familiarity with certain classes. I am sorry that rabbits, a weak and an innocent, but monstrously destructive race, should have to be destroyed in great number as they were and are being, to save our people from qualified starvation. I agree with the Master of the Rolls that rats, beetles and other pests if they have to be destroyed should be destroyed with as little cruelty as possible. But destroyed they must be. The lives of animals at the best are precarious. Millions have perished in the last frost. That is a regrettable necessity. But however it is looked at, the life and happiness of human beings must be preferred to that of animals. Mankind, of whatever race or breed, is on a higher plane and a different

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level from even the highest of the animals who are our friends, helpers and companions. No one faced with the decision to choose between saving a man or an animal could hesitate to save the man. I have turned for a while to considerations of fact because that is inevitable in balancing conflicting values. To my mind the scale of the anti-vivisectionist mounts up and kicks the beam. A statesman is constantly weighing conflicting moral and material utilities. I must add that I have great doubt, even apart from the final argument which I shall advert to in a moment, that the object of abolishing vivisection can on any view be regarded as being in law a public charitable object. It is not analogous to any of the objects enumerated in the preamble to the statute. Its only claim to be admitted must rest on the fourth head. To get into that class it must be established that it is beneficial to the community. What it seems to do however is to destroy a source of enormous blessings to mankind. That is a positive and calamitous detriment of appalling magnitude. Nothing is offered by way of counterweight but a vague and problematical moral elevation. The law may well say that quite apart from any question of balancing values, an assumed prospect, or possibility of gain so vague, intangible and remote cannot justly be treated as a benefit to humanity, and that the appellant cannot get into the class of charities at all unless it can establish that benefit. If it fails, it can still continue to carry on such lawful purposes as the members desire and its funds, exiguous as they are, permit. Apart from the "animal" cases I cannot find any precedent for such an object being held charitable. On the other hand, the vivisectionists, who are attacked, can fairly claim that their purpose is charitable and would generally be so recognized either under the fourth head of the accepted classification or under the head of advancement of learning. I think that the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits and at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class. By this test the claim of the appellant society would fail.

But there is another and essentially different ground on which in my opinion it must fail; that is, because its object is to secure legislation to give legal effect to it. It is, in my opinion,

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a political purpose within the meaning of Lord Parker's pronouncement in *Bowman* v. *Secular Society, Ld.* (1). Lord Parker was discussing in a different connexion the same question of the true criterion for deciding if charitable gifts are for the benefit of the public in the legal sense ; he was there referring to the objects enumerated in the memorandum of association of the Secular Society, Ld. He said : " Now, if your Lordships will " refer for a moment to the society's memorandum of associ" ation you will find that none of its objects, except, possibly, " the first, are charitable. The abolition of religious tests, the " disestablishment of the church, the secularization of education " the alteration of the law touching religion or marriage, or the " observation of the Sabbath, are purely political objects. " Equity has always refused to recognize such objects as " charitable. It is true that a gift to an association formed for " their attainment may, if the association be unincorporated, " be upheld as an absolute gift to its members, or, if the " association be incorporated, as an absolute gift to the cor" porate body ; but a trust for the attainment of political " objects has always been held invalid, not because it is " illegal, for everyone is at liberty to advocate or promote by " any lawful means a change in the law, but because the court " has no means of judging whether a proposed change in the " law will or will not be for the public benefit, and therefore " cannot say that a gift to secure the change is a charitable " gift." While I was preparing this part of my opinion my noble and learned friend Lord Simonds was kind enough to draw to my attention the passage which, in due course, your Lordships will hear quoted by him from a work of authority, Tyssen on Charitable Bequests, 1st ed., p. 177. It is, I think, a very important contribution to this question. It appears to me to go to explain and justify Lord Parker's opinion. I refer especially to Tyssen's words : " the law " could not stultify itself by holding that it was for the public " benefit that the law itself should be changed " and again : " each court . . . . must decide on the principle that the law " is right as it stands." I am reminded of the words of a great common law judge who warned the courts against usurping the functions of the legislature. I do not regard the statements of Lord Parker and Tyssen as inconsistent but as complementary. In my opinion, the respondents' objection under this head is well founded. The commissioners held that " the

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(1) [1917] A. C. 406, 442.

" alteration of the law by means of legislation is a main purpose " of the society, but the repeal of the Act of Parliament, i.e., " 39 & 40 Vict., c. 77 "(the Cruelty to Animals Act, 1876, which I have referred to above) " was undoubtedly part of the " society's object in 1895." They accordingly felt bound to follow Chitty J. on this point as they had done on the first point. Your Lordships are not bound by the judgment of Chitty J. and I prefer the reasoning on the point of Rowlatt J. in *Inland Revenue Commissioners* v. *Temperance Council of the Christian Churches of England and Wales* (1). Rowlatt J. held in respect of the respondent in that appeal that the purpose was not charitable but political within the meaning of the principle stated by Lord Parker. He held that legislation occupied the greater part of the field in the description of the objects of the respondent. He held that any purpose of influencing legislation is a political purpose in this connexion on the clear authorities: that the respondent's direct purpose was to effect changes in the law and that was not a charitable purpose. He distinguished what he called the anti-vivisection cases (that is the cases which I have been discussing) on the ground that in them the alteration of the law was subsidiary and not a main purpose. While I agree with the decision of Rowlatt J., I venture to think that he fell into error in distinguishing as he did, the anti-vivisection cases, or at least that his assumed ground of distinction could not be applied in the present case. The commissioners here held categorically as already stated that the repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether was the main object of the society. I accordingly treat the judgment of Rowlatt J. which I have just cited as a precise authority from that very eminent judge to support my conclusion that, on this special ground, in addition to the others I have mentioned, the objects of the appellant society were not charitable. Rowlatt J.'s judgment was distinguished but not disapproved by Lawrence L.J. in *In re Hood* (2): " In that case," he said, " the gift was not for the " promotion of temperance generally, but was for the promotion " of temperance mainly by political means." These words, mutatis mutandis, can be applied aptly to the present case. The illustrations given by Lord Parker in the passage quoted above show clearly what meaning he attached to the word political. It was not limited to party political measures but

(1) 136 L. T. 27.
(2) [1931] 1 Ch. 240, 252.

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would cover activities directed to influence the legislature to change the law in order to promote or effect the views advocated by the society. Such a change would be in the same category as the instances given by Lord Parker of what he regarded as political objects and would exclude the appellant from the category of charities. Its proposed object is of a public and very controversial character. The present capacity of the appellant society is not great but the possibilities of political agitation would be immensely increased if a few millionaires were to endow it with great financial resources. This conclusion does not in any way extend or affect the freedom of the society to promote their cause which is lawful enough by any legitimate or proper means. But it does prevent them from claiming the benefit of being immune from income tax, which would amount to receiving a subsidy from the state to that extent. Lord Parker, was I think, merely enunciating a specific limitation on the extent of the legal definition of charitable trusts. There are in this case stronger grounds than Lord Parker contemplated in his broader statement of principle for the court declining to say that a gift to secure the change is a charitable gift.

I would dismiss the appeal.

LORD PORTER. My Lords, the question what is or is not a charity is always a difficult problem, partly, I think, owing to the fact that the meaning now attributed to the word is derived from the preamble to the Act of Elizabeth, which (though the Act itself has been repealed) has been re-enacted and gives a kind of example of the class of matters then held to be charitable. From this beginning legal decisions have extended the meaning of the word to many matters which would not originally have been included. But the difficulty does not lie in the origin of the doctrine alone. It is, I think, inherent in the subject-matter under consideration. Whether any two persons would agree in all cases as to what " charity " should include is at least doubtful. It is not the law but the diversity of subjects which creates the difficulty. A step towards a closer definition was, however, reached in *Pemsel's* case (1) in Lord Macnaghten's well-known speech dividing charitable objects into four classes, with the result that at the present day all claims to embrace an object under the head of a charity must assert that it comes within one of the four classes. In the

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(1) [1891] A. C. 531.

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present case the appellants claim to come under the fourth head. "Charity," says Lord Macnaghten (1), "in its legal "sense comprises four principal divisions—trusts for the relief "of poverty; trusts for the advancement of education; "trusts for the advancement of religion; and trusts for other "purposes beneficial to the community, not falling under any "of the preceding heads." From this language it might well have been argued that trusts for any of the first three objects were charitable whether they were beneficial to the community or not, but that inclusion in the fourth class is only permissible if such benefit can be shown. I cannot, however, find that such a contention has ever been put forward. It was expressly repudiated by both sides in the present case and rejected by Russell J. as he then was in *Hummeltenberg's* case (2). One must take it therefore that in whichever of the four classes the matter may fall, it cannot be a charity unless it is beneficial to the community or to some sufficiently defined portion of it.

The difficulties of the present case arise first in determining what is of benefit to the public and who is to determine that question; but a not less difficult, though perhaps less subtle, question is whether the objects of the appellant society are political within the meaning of that word as used by Lord Parker in *Bowman's* case (3). The facts are fully stated by my noble and learned friend Lord Simonds, and he has quoted the material passages from the findings of the commissioners. In so far as those findings are for them and are determinative of the matter in issue your Lordships are, of course, bound by their decision. The only questions therefore are (1.) whether the finding of the commissioners that "the main object of the "society is the total abolition of vivisection and (for that "purpose) the repeal of the Cruelty to Animals Act, 1876, "and the substitution of a new enactment prohibiting "vivisection altogether" amounts to a finding that the society's object is political in the sense in which that word is used when it is said that political objects are not charitable, and (2.) whether the finding that "any assumed public benefit "in the direction of the advancement of morals and education "is far outweighed by the detriment to medical science and "research and consequently to the public health which would "result if the society succeeded in achieving its object, and that "on balance, the object of the society, so far from being for the

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(1) [1891] A. C. 583.

(2) [1923] 1 Ch. 237, 240.

(3) [1917] A. C. 406, 442.

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" public benefit, is gravely injurious thereto " is a finding of fact as a result of which your Lordships ought to hold that the objects of the society are not charitable. My Lords, before dealing with the first question I would desire to point out that read strictly the second finding would appear to contrast moral and educational advancement with the public health and so to contrast an ethical with a material benefit. It was, however, strenuously and, I think, successfully urged by the respondents that this was not an accurate summing up of the position. The object of curing human or even animal illness and suffering itself aims at a moral end and the question is not fairly stated as a conflict between material and moral benefits, but is, as Mr. Grant on the part of the appellants was prepared to accept, a conflict between one ethical outlook and another. His point was not that the material must give place to the moral but that the commissioners or the court are not empowered to decide such a question. In the words of Chitty J. in *In re Foveaux* (1) " the court stands neutral." The commissioners against their own judgment felt themselves bound to follow the opinion of Chitty J. in that case. Macnaghten J. however and the majority of the Court of Appeal (the Master of the Rolls dissenting) took a contrary view (2). In both cases the decision turned on the second point. Neither tribunal decided the first though it is obviously important and, as I understand, in the view of the majority of your Lordships, is determinative of the present case in favour of the respondents.

(1.) As my noble and learned friend Lord Simonds points out, it is curious how scanty the authority is for the proposition that political objects are not charitable, and the only case quoted by Lord Parker in *Bowman's* case (3), viz.: *De Themmines* v. *De Bonneval* (4), turned upon public policy not upon what, apart from that question, is or is not a charity. Moreover the illustrations given by Lord Parker (5) of the political matters which he had in mind : " The abolition of religious tests, the " disestablishment of the church, the secularization of edu-" cation, the alteration of the law touching religion or marriage, " or the observation of the Sabbath," are I think, primarily matters which could not be effected without an alteration of the law. The object in each case is to do away with a positive injunction to which an end can only be put by repealing the law;

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(1) [1895] 2 Ch. 501, 503.

(2) [1946] K. B. 185.

(3) [1917] A. C. 406.

(4) 5 Russ. 288.

(5) [1917] A. C. 406, 442.

an Act of Parliament is required in order to do so. An example may be taken from the first illustration given by Lord Parker. No agreement come to by individuals or groups could dispense with the obligation of complying with the provisions of the Test Acts, whereas slavery or vivisection could be put an end to without disobedience to the law if all members of the community could be induced to desist from these practices. It is in the narrower sense in which I think the phrase "purely "political objects" is rightly used, i.e., as applicable to objects whose only means of attainment is a change in the law. I cannot accept the view that the anti-slavery campaign or the enactment of the Factory Acts or the abolition of the use of boy labour by chimney-sweeps, would be charitable so long as the supporters of these objects had not in mind or at any rate did not advocate a change in the laws, but became political and therefore non-charitable if they did so. To take such a view would to me be to neglect substance for form. The object was to stop slavery or the use of boy chimney-sweeps, and to ensure that certain minimum requirements were carried out in factories. All this could be done by common consent, though no doubt the only effective method would be to alter the law. But persuasion not force was a possible means of effecting the desired purpose. So in the case of members of an anti-vivisection society a conceivable though a very unlikely way of effecting its purpose would be to persuade mankind to cease from experiments on animals, and it is possible that its members would prefer success by that means, though I have no doubt they would frankly admit that they saw no possibility of such an event. They would not, however, be asking anyone to break the law by refraining from vivisection. Their primary object, as I see it, is to prevent animal suffering caused by vivisection, though a main method of effecting that end is to repeal the present Act and such repeal is in that sense a main object of the society. As the commissioners say: "We are satisfied that the "main object of the society is the total abolition of vivisection ". . . . and (for that purpose) the repeal of the Cruelty to "Animals Act, 1876, and the substitution of a new enactment "prohibiting vivisection altogether." And again, "We agree "that the alteration of the law by means of legislation is a main "purpose of the society." In so far as the decision of Rowlatt J. in *Inland Revenue Commissioners* v. *Temperance Council of the Christian Churches of England and Wales* (1) is incon-

(1) 136 L. T. 27.

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sistent with this view, I do not agree with it, though a distinction might be made between that case and this in as much as there legislation is put in the forefront of the objects of the council, and some support for this view may perhaps be gained from the decision in *In re Hood* (1). Moreover, as the commissioners point out this point was as open and as valid in *In re Foveaux* (2) as in this case and yet it was never taken. For these reasons, which perhaps differ a little from those presented by the Master of the Rolls, I agree with his view on this point and in as much as none of the other members of the courts below dealt with it do not find myself at variance with any of their expressed views.

(2.) On the second point the respondents say (*a*) that the object if it is to be charitable must like any other charitable object be for the benefit of the public; (*b*) the commissioners have held that on balance the object of the society, so far from being for the public benefit, was gravely injurious thereto: and (*c*) that finding was one of fact and conclusive of the case as against the appellants. The appellants on their part maintain that trusts inculcating humanity towards animals are (as has frequently been held) for the public benefit and that it is not for the commissioners or a court to enter into what may be fine distinctions between the amount of benefit to be obtained on the one hand and the disadvantages to be suffered on the other. The conflict, as I see it, is between the view held by Chitty J. in *In re Foveaux* (2) and the criticisms or suggested criticisms of that view to be found in the judgment of Russell J., as he then was, in *In re Hummeltenberg* (3) and in that of the Court of Appeal of whom Russell L.J. formed one in *In re Grove-Grady* (4). Any observations of that learned judge whether in the court of first instance, the Court of Appeal or your Lordships' House, even though not strictly an essential part of his decision, could only be differed from with diffidence and it is therefore necessary to consider their exact bearing in the cases in which they are found. One thing is certain and was not contested by Mr. Grant—the intention of the donor in making the gift cannot affect the result. The question must be judged independently of his idea of what is or is not charitable, but undoubtedly, as has been pointed out more than once, a gift for the protection of animals is prima facie at any rate a good charitable gift. It is enough in this connexion to refer to the observations of Swinfen

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(1) [1931] 1 Ch. 240.

(2) [1895] 2 Ch. 501.

(3) [1923] 1 Ch. 237, 239.

(4) [1929] 1 Ch. 557.

Eady L.J. in *In re Wedgwood* (1). Such a gift then being prima facie charitable must remain charitable unless its charitable nature is taken away because on the whole it does more harm than good in the eyes of some tribunal authorized to determine that question. Chitty J., as I understand him, said in *In re Foveaux* (2) that that question was not one which the tribunal of fact was entitled to decide. The court or the commissioners, as the case may be, were authorized to determine whether the object was one of a class which was or had been held to be charitable, i.e., whether it was one of a class which prima facie benefited the public. After that the tribunal remained neutral. It was not for it, in a conflict of opposed opinions, to analyse further the beneficial or injurious results of the gift.

In re Foveaux (3) has more than once been quoted since its decision and apparently accepted without criticism except in so far as Lord Russell can be said to disapprove of it and save for such qualifications of the acceptance of its doctrine as may have been implied in the earlier case of *In re Douglas* (4). In *In re Wedgwood* (5) it appears to have been accepted without comment by Kennedy and Swinfen Eady L.JJ. and Lord Hanworth M.R. cites it without criticism in *In re Grove-Grady* (6). Moreover, its principle does, I think, receive support from such a case as *Attorney-General* v. *Marchant* (7). It is true that in that case Kindersley V.-C. refused to increase a gift of doles proportionately with the increase which he granted to a number of other charitable objects on the ground that doles, though for the relief or property, were harmful rather than beneficial. But he acted in this way only with regard to accretions to the original gifts on the ground that the court had a discretion, where the original gift has been unexpectedly augmented, to add or not to add to the sum originally given to any one of the different objects. The original gift itself presumably was just as harmful as the accretion would have been, but that portion of the dole he did not, and, indeed, it was not suggested that he could, touch. *In re Campden Charities* (8) also turned upon the discretion which the court was given of varying the objects of a chaiity, where, but only where, a scheme was settled cy-près by the Charity Commissioners as a result of a complete change in the character of the neighbourhood and in the value of the gift. The judgment deprecated the giving and denied the benefit to be obtained from doles but nowhere said or attempted to say that to give them would not be a good charity. All it decided was that where the court was bound to administer the funds cy-près it had a discretion as to the objects to be included in the scheme and was under no obligation to perpetuate doles.

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(1) [1915] 1 Ch. 113, 122.
(2) [1895] 2 Ch. 501, 503.
(3) Ibid. 501.
(4) 33 Ch. D. 472.
(5) [1915] 1 Ch. 113.
(6) [1929] 1 Ch. 557.
(7) (1866) L. R. 3 Eq. 424.
(8) (1881) 18 Ch. D. 310.

There remain for consideration Lord Russell's two warnings. In *In re Hummeltenberg* (1) he was discussing the question whether the intention of the giver plays any part in making the object charitable or not, and decided that it has no effect and added: "In my opinion the question whether a gift is or may be "operative for the public benefit is a question to be answered "by the court by forming an opinion upon the evidence "before it." It will be observed that the opinion which the court has to form is whether the gift is, or may be for the public benefit, not whether on the balance of evidence the scale inclines one way or the other. If the latter were the true meaning I do not know why the words "or "may be" were added. The phraseology is at least capable of the interpretation that the court has to determine whether the gift comes within the category of things beneficial to the public not whether on balance the tribunal holds that the disadvantages attached to it outweigh its benefits. *In re Grove-Grady* (2) was concerned with this very point, viz.: was the gift in question within that class which could be held to be a charity. The Court of Appeal differing from Romer J. held by a majority (3) that it could not because there was no benefit to the community in a devise to form a reserve for animals of all kinds, wild or tame, free from the interference of man and with no provision even for his observation of the result. Lord Hanworth M.R. after citing the language of Russell J. in *In re Hummeltenberg* (1) follows *In re Wedgwood* (4) in quoting the words of Fitzgibbon L.J. in *In re Cranston* (5): "Any gift "which proceeds from a philanthropic or benevolent motive, "and which is intended to benefit an appreciably important "class of our fellow creatures (including, under decided cases, "animals), and which will confer the supposed benefit without "contravening law or morals, will be 'charitable'" and adopts the views of Kennedy and Swinfen Eady L.JJ. in the

(1) [1923] 1 Ch. 237, 242.
(2) [1929] 1 Ch. 557.
(3) Ibid. 572.
(4) [1915] 1 Ch. 113.
(5) [1898] 1 Ir. R. 431, 446.

former case. The statement of Fitzgibbon L.J. undoubtedly requires qualification in that it appears to make the intention of the donor the deciding factor and fails to point out that it is the stimulation of humane and generous sentiments in man and not the protection of animals per se which is important but this fact does not affect the view adopted by Lord Hanworth M.R. Russell L.J., however, contemplates (1) the possibility of anti-vivisection societies being removed from the class of charities in the light, as he says, of later knowledge in regard to the benefits accruing to mankind from vivisection.

In answer to this suggestion it is immaterial to consider the evidence which Chitty J. had before him in *In re Foveaux* (2), since the principle which he adopts is not that he is constrained by the evidence to hold the society charitable when he came to weigh the advantages of vivisection against the benefits to be obtained by a crusade against it. Russell L.J. on the contrary appears to take the view that the case for and against the benefits to be conferred is to be decided by some tribunal which shall determine whether the humane and generous sentiments exhibited in a desire to save animals from suffering may not be outweighed by the benefits conferred by inflicting it. I find it difficult to accept the view that, once an object has been held to be included in the class of charities, it is then for the court to hear the evidence of witnesses on the one side and on the other as to whether it is in fact beneficial. I can imagine the severest contest between two sets of witnesses in the case of a gift for a religious purpose, the one saying that it is most beneficial and the other that it is very harmful. Is the tribunal to make up its mind between these two views whether on balance the gift is beneficial to the community or not? Yet if the argument be that the tribunal is to make up its mind on the evidence called before it, I cannot see where it can stop short of determining the matter on the ordinary principles upon which courts act in deciding upon a conflict of evidence, nor can I see any method of determining what preponderance of weight is to incline the scale sufficiently to one side or the other. This view is, I think, in accordance with the opinion of Sir John Romilly M.R. in *Thornton* v. *Howe* (3) (the Joanna Southcote case) when he says (inter alia): "If the tendency were not "immoral, and although this court might consider the opinions "sought to be propagated, foolish or even devoid of foundation, it would not, on that account . . . . take it out of the

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(1) [1929] 1 Ch. 557, 582.

(2) [1895] 2 Ch. 501.

(3) 31 Beav. 14, 20.

"class of legacies which are included in the general terms "charitable bequests." Undoubtedly the object must not be a mere fad or contrary to public policy but no argument against the claim of the society was presented to your Lordships on either of these points and fads can be dealt with by the method suggested by Kennedy L.J. in *In re Wedgwood* (1). In my view the object of this society is the protection of animals from the sufferings believed to be involved in vivisection, that object is, in accordance with the decisions in what may be called the animal cases, charitable and does not cease to be charitable, in spite of the finding of the commissioners that its success would be gravely injurious to the public benefit. For these reasons which are substantially those expressed by the Master of the Rolls, as well as because I do not think the objects of the society are political in the sense which would prevent them being charitable, I would allow the appeal.

LORD SIMONDS. My Lords, the question raised in this appeal is whether the National Anti-Vivisection Society, which I will call "the society," is a body of persons established for charitable purposes only within the meaning of s. 37 of the Income Tax Act, 1918, and, accordingly, entitled to exemption from income tax on the income of its investments. Before I refer to the cases and to the judgments in the courts below I will state the two questions which appear to me to be raised in this appeal. The first and shorter point is whether a main purpose of the society is of such a political character that the court cannot regard it as charitable. To this point little attention was directed in the courts below. It is mentioned only in the judgment of the learned Master of the Rolls. As will appear in the course of this opinion, it is worthy of more serious debate. The second point is fundamental. It is at the very root of the law of charity as administered by the Court of Chancery and its successor, the Chancery Division of the High Court of Justice. It is whether the court, for the purpose of determining whether the object of the society is charitable may disregard the finding of fact that any assumed public benefit in the direction of the advancement of morals and education was far outweighed by the detriment to medical science and research and consequently to the public health which would result if the society succeeded in achieving its object, and that on balance, the object of the society, so far from being for the public benefit, was gravely injurious thereto. The society says that the court must disregard this fact, arguing that evidence of disadvantages or evils which would or might result from the stopping of vivisection is irrelevant and inadmissible.

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(1) [1915] 1 Ch. 113, 118.

My Lords, on the first point the learned Master of the Rolls cites in his judgment (1) a passage from the speech of Lord Parker in *Bowman* v. *Secular Society, Ld.* (2): " A trust for the " attainment of political objects has always been held invalid, " not because it is illegal . . . . but because the court has " no means of judging whether a proposed change in the law " will or will not be for the public benefit." Lord Parker is here considering the possibility of a valid charitable trust and nothing else and when he says " has always been held invalid " he means " has always been held not to be a valid charitable " trust." The learned Master of the Rolls found this authoritative statement upon a branch of the law, with which no one was more familiar than Lord Parker, to be inapplicable to the present case for two reasons, first, because he felt difficulty in applying the words to " a change in the law which is in " common parlance a ' non-political ' question," and secondly, because he thought they could not in any case apply, when the desired legislation is " merely ancillary to the attainment of " what is ex hypothesi a good charitable object."

My Lords, if I may deal with this second reason first, I cannot agree that in this case an alteration in the law is merely ancillary to the attainment of a good charitable object. In a sense no doubt, since legislation is not an end in itself, every law may be regarded as ancillary to the object which its provisions are intended to achieve. But that is not the sense in which it is said that a society has a political object. Here the finding of the commissioners is itself conclusive. " We are " satisfied," they say, " that the main object of the society is " the total abolition of vivisection . . . . and (for that " purpose) the repeal of the Cruelty to Animals Act, 1876, " and the substitution of a new enactment prohibiting vivi" section altogether." This is a finding that the main purpose of the society is the compulsory abolition of vivisection by Act of Parliament. What else can it mean? And how else can it be supposed that vivisection is to be abolished? Abolition and suppression are words that connote some form of compulsion. It can only be by Act of Parliament that that element can be supplied. Upon this point I must with respect differ

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(1) [1946] K. B. 185, 207.

(2) [1917] A. C. 406, 442.

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both from the learned Master of the Rolls and from Chitty J. whose decision in *In re Foveaux* (1) I shall later consider. Coming to the conclusion that it is a main object, if not the main object, of the society, to obtain an alteration of the law, I ask whether that can be a charitable object, even if its purposes might otherwise be regarded as charitable.

My Lords, I see no reason for supposing that Lord Parker in the cited passage used the expression "political objects" in any narrow sense or was confining it to objects of acute political controversy. On the contrary he was, I think, propounding familiar doctrine, nowhere better stated than in a text-book, which has long been regarded as of high authority but appears not to have been cited for this purpose to the courts below (as it certainly was not to your Lordships), Tyssen on Charitable Bequests, 1st ed. The passage which is at p. 176, is worth repeating at length: "It is a common practice for a number of "individuals amongst us to form an association for the purpose "of promoting some change in the law, and it is worth our "while to consider the effect of a gift to such an association. "It is clear that such an association is not of a charitable "nature. However desirable the change may really be, the "law could not stultify itself by holding that it was for the "public benefit that the law itself should be changed. Each "court in deciding on the validity of a gift must decide on the "principle that the law is right as it stands. On the other "hand, such a gift could not be held void for illegality." Lord Parker uses slightly different language but means the same thing, when he says that the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. It is not for the court to judge and the court has no means of judging. The same question may be looked at from a slightly different angle. One of the tests, and a crucial test, whether a trust is charitable, lies in the competence of the court to control and reform it. I would remind your Lordships that it is the King as parens patriæ who is the guardian of charity and that it is the right and duty of his Attorney-General to intervene and inform the court, if the trustees of a charitable trust fall short of their duty. So too it is his duty to assist the court, if need be, in the formulation of a scheme for the execution of a charitable trust. But, my Lords, is it for a moment to be supposed that it is the function of the Attorney-General on behalf of the Crown to intervene and demand that a trust shall be established and administered by the court, the object of which is to alter the law in a manner highly prejudicial, as he and His Majesty's Government may think, to the welfare of the state ? This very case would serve as an example, if upon the footing that it was a charitable trust it became the duty of the Attorney-General on account of its maladministration to intervene. There is undoubtedly a paucity of judicial authority on this point. It may fairly be said that *De Themmines* v. *De Bonneval* (1), to which Lord Parker referred in *Bowman's* case (2), turned on the fact that the trust there in question was held to be against public policy. In *Inland Revenue Commissioners* v. *Temperance Council of the Christian Churches of England and Wales* (3), the principle was clearly recognized by Rowlatt J., as it was in *In re Hood* (4). But in truth the reason of the thing appears to me so clear that I neither expect nor require much authority. I conclude upon this part of the case that a main object of the society is political and for that reason the society is not established for charitable purposes only. I would only add that I would reserve my opinion on the hypothetical example of a private enabling Act, which was suggested in the course of the argument. I do not regard *In re Villers-Wilkes* (5) as a decision that a legacy which had for its main purpose the passing of such an Act is charitable.

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(1) [1895] 2 Ch. 501.

The second question raised in this appeal, which I have already tried to formulate, is of wider importance, and I must say at once that I cannot reconcile it with my conception of a court of equity that it should take under its care and administer a trust, however well-intentioned its creator, of which the consequence would be calamitous to the community. I would not weary your Lordships with a historical excursion into the origin of the equitable jurisdiction in matters of charity, one of the " heads of equity " as Lord Macnaghten called it in *Pemsel's* case (6). Undoubtedly the favour shown by the civil law to gifts in pios usus had some part in it. So too had the conception, to which I have already referred, that the King as parens patriæ took under his special care charitable gifts as he took also infants and lunatics. But, whatever its origin, from the fact of its existence arose the necessity of definition. And so both before and after the Statute of 43 Elizabeth it became the duty of the Court of Chancery to determine what

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(1) 5 Russ. 288.

(2) [1917] A. C. 406.

(3) 136 L. T. 27.

(4) [1931] 1 Ch. 240, 250, 252.

(5) (1895) 72 L. T. 323.

(6) [1891] A. C. 531, 580.

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objects were and what were not charitable. I will refer to Tyssen again at p. 5, "One by one," he says, "the question of "the validity of such trusts was brought before the Court of "Chancery . . . . It considered only this. Having regard to "all legislative enactments and general legal principles is it or "is it not for the public benefit that property should be devoted "for ever to fulfilling the purpose named? If the court "considered that it was not for the public benefit, it held the "trust altogether void . . . ." The learned author proceeds to illustrate his statement by reference to various trusts which the court held to be invalid, as trusts to say masses for the donor's soul, to keep in repair a tomb outside a church, or to teach religious opinions for which penalties were inflicted by statute. The task of the court was in some degree simplified by the Statute of Elizabeth, which made it clear that at least the purposes enumerated in the preamble were charitable, but from the beginning it appears to have been assumed that the enumeration was not exhaustive and that those purposes also were charitable which could be fairly regarded as within its spirit and intendment. This view enabled the court to extend its protection to a vast number of objects which appeared both to the charitable donor and to it to be for the benefit of the community. Nowhere perhaps did the favour shown by the law to charities exhibit itself more clearly than in the development of the doctrine of general charitable intention, under which the court, finding in a bequest (often, as I humbly think, on a flimsy pretext) a general charitable intention, disregarded the fact that the named object was against the policy of the law and applied the bequest to some other charitable purpose. Thus in *De Costa* v. *De Pas* (1) Lord Hardwicke applied a bequest for instructing the people in the Jewish religion (then regarded as an illegal purpose) for the benefit of the Foundling Hospital, and in *Cary* v. *Abbot* (2) Grant M.R. directed that the residue of an estate, which had been bequeathed for the instruction of children in the Roman Catholic faith, should be applied as the King by Sign Manual should direct. I refer to this doctrine in a brief review of the equitable jurisdiction only because, as I think, it has been the cause of some confusion in the argument which has been presented to the House. It would be very relevant, if the society, conceding that the campaign against vivisection was not a charitable purpose, argued that there was yet a general charitable intention and that its funds were applicable to some other charitable purpose. That is not the argument. If it were, I should not entertain it, though it might in an earlier age have succeeded.

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(1) (1753) Amb. 228.

(2) 7 Ves. 490, 496.

My Lords, this then being the position, that the court determined "one by one" whether particular named purposes were charitable, applying always the overriding test whether the purpose was for the public benefit, and that the King as parens patriæ intervened pro bono publico for the protection of charities, what room is there for the doctrine which has found favour with the learned Master of the Rolls and has been so vigorously supported at the bar of the House, that the court may disregard the evils that will ensue from the achievement by the society of its ends? It is to me a strange and bewildering idea that the court must look so far and no farther, must see a charitable purpose in the intention of the society to benefit animals and thus elevate the moral character of men but must shut its eyes to the injurious results to the whole human and animal creation. I will readily concede that, if the purpose is within one of the heads of charity forming the first three classes in the classification which Lord Macnaghten borrowed from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham* (1), the court will easily conclude that it is a charitable purpose. But even here to give the purpose the name of "religious" or "education" is not to conclude the matter. It may yet not be charitable, if the religious purpose is illegal or the educational purpose is contrary to public policy. Still there remains the overriding question: Is it pro bono publico? It would be another strange mis-reading of Lord Macnaghten's speech in *Pemsel's* case (2) (one was pointed out in *In re Macduff* (3)) to suggest that he intended anything to the contrary. I would rather say that, when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and, therefore, charitable, unless the contrary is shown, and further that the court will not be astute in such a case to defeat on doubtful evidence the avowed benevolent intention of a donor. But, my Lords, the next step is one that I cannot take. Where on the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object. If and so far as there is any judicial decision to the contrary, it must, in my opinion, be regarded as inconsistent with principle and be overruled. This proposition is clearly stated by Russell J. in *In re Hummeltenberg* (1). " In my opinion," he said, " the question whether a gift is or " may be operative for the public benefit is a question to be " answered by the court by forming an opinion upon the " evidence before it." This statement of that very learned judge follows immediately upon some observations on the cases of *In re Foveaux* (2) and *In re Cranston* (3) which were the mainstay of the appellant's argument.

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(1) 10 Ves. 521.
(2) [1891] A. C. 531.
(3) [1896] 2 Ch. 451.

In *In re Foveaux* (2) a testatrix had bequeathed legacies to two societies described briefly by Chitty J. as the two defendant anti-vivisection societies, one of them being the appellant society under the name which it then bore. The question as stated by the learned judge was whether they were charities in the technical sense in which the term " charity " is used in law. That is the same question as that which your Lordships have to decide here. Chitty J. decided that they were charities. His judgment concludes with these words (4): " The purpose of " these societies, whether they are right or wrong in the opinions " they hold, is charitable in the legal sense of the term. The " intention is to benefit the community; whether, if they " achieved their object, the community would, in fact be " benefited is a question on which I think the court is not " required to express an opinion. The defendant societies may " be near the border line, but I think they are charities." These words, which appear to me to be in direct opposition to the passage that I have cited from the judgment of Russell J., in effect repeat what Chitty J. said earlier in his judgment (5): " In determining this question of charity the court does not " enter into or pronounce any opinion on the merits of the " controversy which subsists between the supporters and " opponents of the practice of vivisection. It stands neutral."

My Lords, in the passages that I have cited from the judgments of Chitty J. and Russell J. the issue is clear cut. Which of them is right? Your Lordships will now see why I have thought it proper, however briefly, to consider the origin of this equitable jurisdiction. For at once this question arises: If, indeed, Chitty J. is right, if it is not the duty of the court

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(1) [1923] 1 Ch. 237, 242.
(2) [1895] 2 Ch. 501.
(3) [1898] 1 I. R. 431.
(4) [1895] 2 Ch. 501, 507.
(5) Ibid. 503.

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to express an opinion whether the community will in fact be benefited, should the object of those, who intend to benefit it, be achieved, at what point in its long history did it cease to be its duty ? One by one the purposes enumerated in the preamble to the Statute of Elizabeth were held to be charitable by a court which performed just this duty and applied this overriding test. And since the statute the court has performed the same duty in determining whether objects alleged to be charitable are within the spirit and intendment of the preamble. May I not cite Chitty J. himslf in this very case ? "After all," he said (1), "the best that can be done is to "consider each case as it arises, upon its own special circum-"stances." Is there a more special circumstance than this, that the fact is proved that "on balance the object of the society "so far from being for the public benefit, was gravely injurious "thereto ?" Nor do I understand why, in his concluding words, Chitty J. said that the defendant societies might be near the border line, if he looked only at their intention and formed no opinion upon the result of their efforts if they were successful. For there could be no doubt on the authority of such cases as *London University* v. *Yarrow* (2) and *Marsh* v. *Means* (3), that a gift for the protection of animals is prima facie a charitable gift for the reason later stated by Swinfen Eady L.J. in *In re Wedgwood* (4). Upon this line of authority Chitty J. founded his judgment and, if intention only was looked at, the defendant societies could fairly claim to be in the heart of the province of charity. If the learned judge had a doubt, it could only have been due to the passing thought that perhaps result as well as intention was material. It is worthy of notice that the same doubt, so strong indeed that final opinion was reserved, was entertained by Cotton, Lindley and Bowen L.JJ. in *In re Douglas* (5). In that case it was unnecessary to determine whether the same anti-vivisection society in its then form was a charity. But the learned lords justices expressly reserved their opinion on the point. I see no reason why they should have done so, unless they held, as I invite your Lordships to hold, that injury to the community must be weighed with the ostensible charitable purpose of the society.

The learned Master of the Rolls, from whose opinion upon a broad question of principle such as this is I differ with great

(1) [1895] 2 Ch. 501, 504.
(2) 2 De G. & J. 72.
(3) 3 Jur. (N. S.) 790.
(4) [1915] 1 Ch. 113, 122.
(5) 35 Ch. D. 472.

reluctance, supports his decision by reference to such cases as *Attorney-General* v. *Marchant* (1) and *In re Campden Charities* (2). In the former case a testator had, in the year 1640, left real estate upon trust to pay 50*l*. per annum to four charitable objects, namely, 20*l*. for the salary of a schoolmaster, 20*l*. to a college for the purchase of books and 5*l*. each to the poor of two parishes, with a direction that any deficiency should be borne rateably. It appears to have been assumed that any excess of the rents and profits of the real estate over 50*l*. was applicable for charitable purposes. There was, in fact, a substantial surplus and the question submitted to the court was whether it should be divided rateably between the charities named in the will or should be appropriated for the benefit of one or more of them to the exclusion of the others. Kindersley V.-C. after referring to the rule of law laid down by Lord Kingsdown in *Attorney-General* v. *Dean and Canons of Windsor* (3), that the accretion was prima facie to be applied and apportioned pro rata among the objects of the testator's bounty, but subject to the discretion of the court to be exercised in certain cases and within certain limits, thus expressed himself (4): " So, I apprehend, if it should appear " that the directions of the testator with respect to a particular " object, if carried out in these days, so far from being beneficial, " would be detrimental to the objects he meant to benefit: " in that case, a good reason would exist for exercising the " discretion." Then he applies this principle to the gifts to the poor of the two parishes and says, " I think, by common " consent, it is established at the present day that there is " nothing more detrimental to a parish, and especially to the " poor inhabitants of it, than having stated sums periodically " payable to the poor of that parish by way of charity. The " poorest class of all is not allowed to participate in such " charities, because the court, in such cases, always excludes " those who are in receipt of parochial relief, inasmuch as that " would be a relief to the poor rates and so a charity to the " ratepayers and not to the poor. The only effect of such " gifts is to pauperize the parish . . . ." Accordingly the Vice-Chancellor declined to increase pro rata the gifts to the poor and directed that the whole of the surplus revenue should be divided between the other two objects of the testator's bounty. My Lords, I find in this decision nothing contradictory to the principles that I have asserted. A purpose deemed charitable in 1640 was no longer deemed charitable in 1866; therefore the court declined to give effect to it in regard to surplus revenues. It does not follow from this that, if in 1640 the court had thought that nothing could be more detrimental to a parish than such doles, it would, nevertheless, have supported the gift as a good charitable gift. The case of *In re Campden Charities* (1) is an authority of some importance in a difficult branch of the law of charity relating to the cy-près application of charitable funds and the jurisdiction of the charity commissioners and it is often cited in that connexion. Substantially the same question had arisen as in *Attorney-General* v. *Marchant* (2). There, too, a bequest had been made for the purchase of lands of the annual value of 10*l.* half of which was to be applied towards the better relief of the most poor and needy people of good life and conversation in the parish of Kensington. The value of the lands so purchased had greatly increased; so had the parish of Kensington. It became necessary to establish a scheme for the administration of the charity, and the charity commissioners did so. Taking the view expressed by Kindersley V.-C. that doles to the poor were detrimental to the parish they in substance diverted to educational purposes a gift which was in part eleemosynary. The Court of Appeal held that they were entitled to do so. "The habits of society," said Jessel M.R. (3), "have changed, "and not only men's ideas have changed, but men's practices "have changed, and in consequence of the change of ideas "there has been a change of legislation; laws have "become obsolete or have been absolutely repealed, and "habits have become obsolete and have fallen into disuse, "which were prevalent at the times when these wills were "made," and, later (4), "with our present ideas on the subject, "and our present experience, which has been gathered as the "result of very careful inquiries by various committees and "commissions on the state of the poor in England, we know "that the extension of doles is simply the extension of mischief." Again, my Lords, I find nothing in this reasoning which is opposed to what I have said. If to-day a testator made a bequest for the relief of the poor and required that it should be carried out in one way only and the court was satisfied by evidence that that way was injurious to the community,

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(1) L. R. 3 Eq. 424.

(2) 18 Ch. D. 310.

(3) (1860) 8 H. L. C. 369, 452.

(4) L. R. 3 Eq. 424, 431.

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(1) 18 Ch. D. 310.
(2) L. R. 3 Eq. 424.
(3) 18 Ch. D. 310, 324.
(4) Ibid. 327.

I should say that it was not a charitable gift, though three hundred years ago the court might upon different evidence or in the absence of any evidence have come to a different conclusion. I have been careful to add the condition that the testator required the gift to be carried out in one way only. For I would again remind your Lordships how much confusion has been introduced by the doctrine of general charitable intention, which is itself the substantial justification of the cy-près doctrine.

The two cases to which I have last referred both fall within one of the three determinate categories in Lord Macnaghten's classifications, the relief of poverty. In a case, which it is sought to bring within the indeterminate fourth category, it is, I think, even more difficult to pause at a certain stage in the inquiry, to say, for example, that the purpose is to protect animals, that kindness to animals is conducive to the moral advancement of man, and to conclude that the purpose is charitable without looking to the end of the matter. Thus, in *In re Grove-Grady* (1), a testatrix left her residuary estate to trustees to found an institution which should have as one of its objects the acquisition of land for the provision of refuges for the preservation of " all animals birds or other creatures not " human." The Court of Appeal by a majority held that the trust not having been shown to be for purposes beneficial to the community was not a good and valid charitable trust. It is instructive to see why not. Lord Hanworth M.R. thus states the law. Having formulated the test in the two familiar questions (1.) is the trust for a purpose beneficial to the community, (2.) if it satisfies that first test, is it charitable, he then asks (2), " Who is to decide these questions ? I agree " with Holmes L.J. that the answer does not depend upon the " view entertained by any individual ' either by the judge " ' who is to decide the question or by the person who makes " ' the gift ' : *In re Cranston* (3). The test is to be applied " from evidence of the benefit to be derived by the public or a " considerable section of it, though a wide divergence of opinion " may exist as to the expediency, or utility of what is accepted " generally as beneficial. The court must decide whether " benefit to the community is established." The learned Master of the Rolls then expressly approved the passage that I have cited from the judgment of Russell J. in *In re Hummel-*

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(1) [1929] 1 Ch. 557.
(2) Ibid. 572.
(3) [1898] 1 I. R. 431.

tenberg (1). The same view is reiterated by that learned judge (Russell L.J., as he then was) (2), " In my opinion, the " court must determine in each case whether the trusts are such " that benefit to the community must necessarily result from " their execution." Counsel for the society sought to distinguish this case on the ground that the initial step was not there taken ; there was not found to be any benefit to the community, so that no question arose of weighing advantage against disadvantage. In this view presumably however slight the benefit, the court must disregard injury however great. Such a view is repellent alike to common sense and to the principles upon which the equitable jurisdiction has been founded.

I ought not to let the case of *In re Cranston* (3) pass unnoticed. In that case the court had to consider whether a bequest to two vegetarian societies was a good charitable bequest, and, though there was no such evidence of injury to the community arising from the activities of the societies as was adduced in this case, yet there were observations in the judgments of the very learned judges who took part in the decision upon which counsel for the appellant properly relied. But they must not be pressed too far. Thus, when Porter M.R. (who first heard the case) (4) felt bound " to give effect to the intention unless there " is some coercive reason to the contary," it is at least open to doubt whether he would not have been coerced to a contrary view if he had found on the evidence that injury to the community was the necessary result of the societies' work. It may indeed be said that even the possibility of a coercive reason to the contrary is fatal to the contention that the court may not look to the end of the chapter. Lord Ashbourne L.C. perhaps went further. For he observed (5) that though the vast majority might be opposed to it and it might be disapproved by medical men, yet he did not feel at liberty to sit in judgment upon objects or purposes or to measure the success which they might then have or might thereafter attain to. If by this the learned Lord Chancellor meant that it was not a matter for his individual opinion, I should not dissent, but I cannot accept it, if he meant that the court could abrogate its duty of deciding on evidence whether the test of charitable purpose was satisfied. Fitzgibbon L.J. uses words which I think worth citing at length. " What," he says (6), " is the tribunal which is to

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(1) [1923] 1 Ch. 237, 242.
(2) [1929] 1 Ch. 557, 588.
(3) [1898] 1 I. R. 431.
(4) Ibid. 435.
(5) Ibid. 445.
(6) Ibid. 446.

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" decide whether the object is a beneficent one? It cannot be " the individual mind of a judge, for he may disagree, toto " coelo, from the testator as to what is or is not beneficial. " On the other hand, it cannot be the vox populi, for charities " have been upheld for the benefit of insignificant sects and of " peculiar people. It occurs to me that the answer must be— " that the benefit must be one which the founder believes to be " of public advantage and his belief must be at least rational " and not contrary either to the general law of the land, or to the " principles of morality." Your Lordships see how inevitably some qualification slips in. Here we have the test of rationality, of conformity with the general law, of the principles of morality. These are tests which the court must examine and, so far as they depend on facts, come to a conclusion on relevant evidence. I do not understand Fitzgibbon L.J. to support the view of the appellant that, given a measure of public advantage, the public disadvantage can be ignored. Walker L.J. appears more strongly to favour the appellant. " The idea," he says (1), " may be erroneous and may be visionary, but it was entertained " honestly by the giver, and her gift was designed for the benefit " of mankind, and I think it is charitable." I can hardly think that the learned lord justice intended to say that the honest opinion of a donor is conclusive. At least an exception must be made in the case of an illegal purpose or a purpose contrary to public policy. The question here, with which he did not purport to deal, is whether it is as fatal to the charitable nature of a gift that it is shown specifically to be to the public detriment as that it is regarded generally as contrary to public policy. From the dissenting judgment of Holmes L.J. your Lordships may get some assistance. That learned lord justice is careful to say (2) that there is nothing illegal or contrary to public policy in the propagation of the doctrines of vegetarianism. The question remained whether the object of the societies was charitable and after stating that the object must be one by which the public, or a section of the public, benefits, the lord justice proceeds (2): " But " what is the test or standard by which a particular gift is to be " tried with a view of ascertaining whether it is beneficial in " this sense? I am of opinion that it does not depend upon " the view entertained by any individual—either by the judge " who is to decide the question, or by the person who makes the

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(1) [1898] 1 I. R. 431, 451. (2) Ibid. 454.

"gift." And he answers the question by saying, "There is "probably no purpose that all men would agree is beneficial to "the community: but there are surely many purposes which "everyone would admit are generally so regarded, although "individuals differ as to their expediency or utility. The test "or standard is, I believe, to be found in this common under-"standing." He then applies this standard to the gift there in question, and, applying it, finds that the object does not benefit mankind and therefore is not charitable. It is, I think, instructive to see how he contrasts the vegetarian and the anti-vivisection claims. Of anti-vivisection he says (1): "There "is a great body of well-informed opinion, holding that it "would be for the true interests of mankind to put an end to it "[i.e., vivisection] altogether. I think that there is no analogy "between a practice such as this, pursued by only a few "individuals, attended with the severest suffering, and pro-"ductive of very doubtful benefit, and the universal habit of "killing animals for human food in a manner that causes at the "most but momentary pain." It may well be that if the finding of the special commissioners in this case had been in similar terms, I should accede to the society's claim. But the value of the observations of the lord justice is that he looks first and last to the true interests of mankind. That is the test. Be the intention of the donor what it will, let him label his gift by what name he likes, he cannot draw a line and say to the court that it shall go thus far and no farther. My Lords, I have dealt at some length with the case of *In re Cranston* (2), partly because it was relied on by the appellant, partly because it is, I think, one of the most important cases in this branch of the law of charity. I do not express any opinion whether it was rightly decided. Still less do I express an opinion whether on such evidence as might to-day be available a similar conclusion, would be reached. I use it for the purpose of emphasizing a view, too often, I fear, reiterated, that the court must still in every case determine by reference to its special circumstances whether or not a gift is charitable.

My Lords, what I have said is enough to conclude this case. But there is an important passage in the judgment of the Master of the Rolls, which I ought not to ignore. "I do not "see," he says (3), "how at this time of day it can be asserted "that a particular exemplification of those objects is not

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(1) [1898] 1 I. R. 431, 458.

(2) Ibid. 431.

(3) [1946] K. B. 185, 205.

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"beneficial merely because in that particular case the achievement of those objects would deprive mankind of certain "consequential benefits however important those benefits may "be. If this were not so, it would always be possible, by "adducing evidence which was not before the court on the "original occasion to attack the status of an established "charitable object to the great confusion of trustees and all "others concerned. Many existing charities would no doubt "fall if such a criterion were to be adopted." I venture with great respect to think that this confuses two things. A purpose regarded in one age as charitable may in another be regarded differently. I need not repeat what was said by Jessel M.R. in *In re Campden Charities* (1). A bequest in the will of a testator dying in 1700 might be held valid on the evidence then before the court but on different evidence held invalid if he died in 1900. So, too, I conceive that an anti-vivisection society might at different times be differently regarded. But this is not to say that a charitable trust, when it has once been established can ever fail. If by a change in social habits and needs, or, it may be, by a change in the law the purpose of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court or in suitable cases to the charity commissioners or in educational charities to the Minister of Education and ask that a cy-près scheme may be established. And I can well conceive that there might be cases in which the Attorney-General would think it his duty to intervene to that end. A charity once established does not die, though its nature may be changed. But it is wholly consistent with this that in a later age the court should decline to regard as charitable a purpose, to which in an earlier age that quality would have been ascribed, with the result that (unless a general charitable intention could be found) a gift for that purpose would fail. I cannot share the apprehension of the Master of the Rolls that great confusion will be caused if the court declines to be bound by the beliefs and knowledge of a past age in considering whether a particular purpose is to-day for the benefit of the community. But if it is so, then I say that it is the lesser of two evils.

My Lords, in a speech, which I recently delivered in this

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(1) 18 Ch. D. 310.

House, I had occasion to say that the cases decided on this branch of the law were legion in number and were not easy to reconcile. This is the first time, so far as I am aware, that the issue in the form in which I have endeavoured to state it has reached this House. If your Lordships are satisfied that the law as laid down by Russell J. (as he then was) in *In re Hummeltenberg* (1) is correct, and the decision of this House confirms it, I believe that it will be a useful landmark in the history of the law of charity.

Lord Normand. My Lords, the appellant society claims exemption from income tax on its investment income on the ground that it is a body of trustees established for charitable purposes only within the meaning of s. 37 of the Income Tax Act, 1918. The trust purposes are to be found in resolutions passed by a general meeting of the society held on July 31, 1897, and by the council on February 9, 1898. Of these resolutions the first declares that the object of the society is to awaken the conscience of mankind to the iniquity of torturing animals for any purpose whatever; to draw public attention to the impossibility of any adequate protection from torture being afforded to animals under the present law; and so to lead the people of this country to call on Parliament totally to suppress the practice of vivisection. By the second resolution, which is described as an explanatory resolution, the council affirmed that, while the demand for the total abolition of vivisection would ever remain the object of the National Anti-Vivisection Society, the society was not thereby precluded from making efforts in Parliament for lesser measures, having for their object the saving of animals from scientific torture.

The first question in the appeal is whether these purposes do not demonstrate that the society is an association for political purposes and not an association or trust for charitable purposes. The distinction between a political association and a charitable trust has not been defined and I doubt whether it admits of precise definition. The Attorney-General however submitted that any association which included among its objects the passing by Parliament of any legislation, unless it were an uncontroversial enabling Act, was to be considered a political association, and must be refused the privileges which the law allows to charities. But no authority was cited which would warrant so extreme a proposition. The formation of voluntary associations for the furtherance of the improvement of morals is familiar, and such associations are a well recognized sub-division of the fourth of Lord Macnaghten's divisions of charities in *Pemsel's* case (1). It is also familiar that trusts for preventing cruelty to animals or for improving the conditions of their lives have found a recognized place in that sub-division. Trusts for the benefit of animals are allowed to be charitable because, to quote the language of Swinfen Eady L.J. in *In re Wedgwood* (2), they tend "to promote and encourage kindness "towards animals, to discourage cruelty, and to ameliorate the "condition of the brute creation, and thus to stimulate humane "and generous sentiments in man towards the lower animals, "and by these means promote feelings of humanity and "morality generally, repress brutality, and thus elevate the "human race." Societies for the amelioration of the condition of animals like other societies for the improvement of human morals do not as a rule limit their activities to one particular method of advancing their cause. Commonly they hope to make voluntary converts, and they also hope to educate public opinion and so to bring its influence to bear on those who offend against a humane code of conduct towards animals. But they seldom disclaim and frequently avow an intention of inducing Parliament to pass new legislation if a favourable opportunity should arise of furthering their purpose by that means. A society for the prevention of cruelty to animals, for example, may include among its professed purposes amendments of the law dealing with field sports or with the taking of eggs or the like. Yet it would not, in my view, necessarily lose its right to be considered a charity, and if that right were questioned, it would become the duty of the court to decide whether the general purpose of the society was the improvement of morals by various lawful means including new legislation, all such means being subsidiary to the general charitable purpose. If the court answered this question in favour of the society, it would retain its privileges as a charity. But if the decision was that the leading purpose of the society was to promote legislation in order to bring about a change of policy towards field sports or the protection of wild birds it would follow that the society should be classified as an association with political objects and that it would lose its privileges as a charity. The problem is therefore to discover the general purposes of the society and

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(1) [1923] 1 Ch. 237, 242.

(1) [1891] A. C. 531, 583.

(2) [1915] 1 Ch. 113, 123.

whether they are in the main political or in the main charitable. It is a question of degree of a sort well known to the courts.

The appellant society is a society for the prevention of cruelty to animals, and it is not disputed that by the vigilance of its members it does much to prevent the infliction of cruelty on animals undergoing experiments. But it has chosen to restrict its attack upon cruelty to a narrow and peculiar field, and it has adopted as its leading purpose the suppression of vivisection by legislation. This is apparent from the resolutions which I have quoted. In the first of them the society condemns the existing legislation as an insufficient protection against the torture of animals, and sets forth as its object the total suppression of vivisection by new legislation passed by Parliament under pressure from an enlightened people. By the second resolution the council affirms that the total abolition of vivisection remains the object of the society but intimates that lesser Parliamentary measures for the protection of animals from scientific torture will also be pursued by the society. The society seems to me to proclaim that its purpose is a legislative change of policy toward scientific experiments on animals, the consummation of which will be an Act prohibiting all such experiments. I regard it as clear that a society professing these purposes is a political association and not a charity. If for legislative changes a change by means of government administration was substituted the result would be the same. In *Bowman* v. *Secular Society* (1), Lord Parker said that " a trust for the attainment of political " objects has always been held invalid, not because it is illegal " . . . . but because the court has no means of judging whether " a proposed change in the law will or will not be for the public " benefit." That was said in a case in which the society was advocating a very important change in the relations of the state and the community towards religion. I respectfully agree with the comment of the Master of the Rolls that Lord Parker's words do not apply when the legislation is merely ancillary to the attainment of what is ex hypothesi a good charitable object. For the charitable purpose, being dominant, would prevail as it did in *Inland Revenue Commissioners* v. *Falkirk Temperance Cafe Trust* (2) and in *In re Hood* (3), where it was held that, the main object of the gift being charitable, the gift was none the less valid because the testator had pointed out one of the means by which, in his opinion, the

(1) [1917] A. C. 406, 442.

(2) 1927 S. C. 261.

(3) [1931] 1 Ch. 240.

main object could best be attained and which in itself might not have been charitable if it had stood alone. But I regret that I cannot agree with the Master of the Rolls in limiting the scope of Lord Parker's words to matters of acute political controversy. Whether a project for new legislation excites acute political controversy may depend on the prudence and good management of the promoters. If they have patiently prepared the way by a gradual education of the public they may succeed in eliminating much of the opposition. But I cannot imagine that it is probable that a measure for the suppression of the kind of research which is impugned by this society would pass without acute controversy. It excites little or no controversy at present because the immediate prospects of its success are negligible, but, if the efforts of the society were to bring success near, acute and bitter controversy would, it is almost certain, become inevitable. But in my opinion it is not relevant to inquire whether the change of policy, for such it would be, represented by the prohibition of experiments on animals, might be accompanied by controversy or not. The relevant consideration is that it would be a change of policy, and that this society makes the achievement of that change by legislation its leading purpose. That, in my opinion, settles the issue in this case. I think that the same reason explains the decision of *Inland Revenue Commissioners* v. *Temperance Council of the Christian Churches of England and Wales* (1), and I adopt the words used of that case by Lawrence L.J. in *In re Hood* (2): " In that case the gift was " not for the promotion of temperance generally, but was for " the promotion of temperance mainly by political means." The appellant society is similarly not a society for the prevention of cruelty to animals generally, but a society for the prevention of cruelty to animals by political means.

It would not, however, be right to pass by in silence the other question which occupied so much of the debate. This question, which in my opinion only arises on the assumption that the appellant society is held not to be a political body, is in brief whether it is sufficient for it to prove that its purpose is to alleviate or prevent the suffering of animals or whether it must prove that on balance its purpose is beneficial to mankind. I confess that my opinion has wavered and that I was for long inclined to agree with the judgment of the Master of the Rolls. But after careful consideration of the speech of my noble and

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(1) 136 L. T. 27.

(2) [1931] 1 Ch. 240, 252

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learned friend Lord Simonds, which I have had the advantage of reading in print, I have come to agree with it. I do not propose to attempt to add anything to what my noble and learned friend has said on this part of the case.

Appeal dismissed.

Solicitors for appellants: *Shield & Son.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

Applied. LANCASTER *v.* L.P.T.B. [1948] 2 All E.R. 796.

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June 5, 6; *July* 28.

GLASGOW CORPORATION . . . APPELLANTS

AND

BRUCE OR NEILSON . . . . RESPONDENT

Master and servant—Common employment—Omnibus service run by local authority—Collision between vehicles—Negligence of driver of one vehicle—Injury to conductress of other vehicle—Liability of local authority.

Two omnibuses belonging to and operated by a local authority but used on different services followed the same route for a substantial distance, the prescribed interval between their times being about one minute. While they were travelling on this common section of their routes they collided owing to the negligence of the driver of one of them, the conductress of the other being thereby injured.

Held that the local authority was liable in damages to the conductress, since she was not in common employment with that driver, inasmuch as she had no special interest in his skill and caution arising out of the relationship between them, but was the victim of a risk of the road which might equally well have arisen from the negligent conduct of some other driver, who was not in the employment of the local authority.

Miller v. *Glasgow Corporation* [1947] A. C. 368 distinguished.

Decision of the Second Division of the Court of Session (sub nom. *Neilson* v. *Pantrini*) 1946 S. C. 446, affirmed.

APPEAL from the Second Division of the Court of Session.

The facts, which are summarized in the head-note, are fully stated in the speech of Viscount Simon.

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* *Present:* VISCOUNT SIMON, LORD THANKERTON, LORD PORTER, LORD OAKSEY and LORD MACDERMOTT.

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Clyde K.C., *Calver K.C.* and *R. Johnston* (all of the Scottish Bar) for the appellants. On the proved facts the respondent's injuries were caused by the fault of a fellow-servant engaged with her in a common work. The question is: Was the nature of the employment such as to bring the two buses into association with one another at the time and place of the accident? It was, for there was a peculiar relationship between them, since they were following one another along the same route at an interval of a minute and were likely to pass and re-pass one another from time to time thus coming within colliding distance. Thus the character of their duties brought the drivers and conductors into juxtaposition exposing them to a risk beyond the general traffic risk. By an implied term in the contract of employment such an association or juxtaposition absolves an employer from liability to one servant for the negligence of his fellow servants. The respondent was subject to risks from all road users plus the risk of injury by another bus belonging to the appellants necessarily in juxtaposition with hers on the same part of the route. Their case is based on the time-table schedule and on the substantial distance that the buses ran on a common route. *Radcliffe* v. *Ribble Motor Services, Ld.* (1) sets out the test of common employment. That case is distinguishable because there the nature of the drivers' employment was such as to dissociate them. *Metcalfe* v. *London Passenger Transport Board* (2) is likewise distinguishable because the whole basis of the decision was that the coming together of the vehicles was wholly fortuitous. *Miller* v. *Glasgow Corporation* (3) is wide enough to cover this case.

M'Kechnie K.C. and *Shearer* (both of the Scottish Bar) were not called on to argue.

THE HOUSE took time for consideration.

July 28. VISCOUNT SIMON. My Lords, the respondent was employed by the appellant corporation as a bus-conductress, and on December 7,1944, was on duty in such employment on a motor-bus engaged on Service No. 19. At about 11.40 a.m. this bus was run into from behind by another of the appellants' motor-buses, which was being driven by a servant of the appellants named Pantrini. This bus was engaged on Service No. 2. A substantial portion of the routes followed in these two services

(1) [1939] A. C. 215, 251.
(2) (1939) 108 L. J. (K. B.) 733.
(3) [1947] A. C. 368.

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is common to both. The accident occurred while both buses were travelling westwards along Great Western Road, Glasgow, which is one of the main arteries of the city for traffic of all sorts. The time-tables of the two services show that the buses operating thereon run at frequent intervals, and it must often happen that such buses travel in close proximity to each other, though if the prescribed timing could always be strictly observed, there would be a larger space between successive vehicles than there was in this instance. The cause of the collision was that the leading bus had to apply its brakes to avoid a pedestrian, and that the following bus, which happened to be close behind, skidded into the former on the ice-bound road, thus injuring the respondent. The respondent brought her action against both Pantrini and the appellants, alleging that Pantrini had caused her injuries by driving negligently, and that the appellants were answerable as his employer. Pantrini put in no defence, and the appellants admitted that the collision and consequent damage were caused by the negligence of Pantrini. But they went on to plead that Pantrini and the respondent were fellow-employees engaged in a common work, and that consequently the appellants were not liable to the respondent. This defence raised the sole issue in the appeal. The Lord Ordinary, Lord Sorn, held that this defence succeeded, and considered that in so deciding he was applying the principle of *Radcliffe* v. *Ribble Motor Services, Ld.* (1), as further expounded by the Inner House in *Miller* v. *Glasgow Corporation* (2). These authorities certainly justify the conclusion that the defence of common employment does not necessarily fail because two vehicles belonging to the same employer collide in a public thoroughfare; but it remains true that in order to exonerate the employer in such instances the risk must be more than the ordinary risk of colliding traffic and must arise out of some special relation between the injured and the negligent fellow-servants. The Second Division (Lord Justice-Clerk Cooper and Lord Stevenson, Lord Mackay dissenting) reversed the Lord Ordinary's decision, holding that the risk to which the respondent was exposed was not due to any special relation, but was an ordinary traffic risk. The respondent's contract of employment with the corporation could not be regarded as containing an implied term that she would in no case hold the corporation liable for the negligence of their bus-drivers in the public road.

(1) [1939] A. C. 215. (2) 1946 S. C. 109.

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Viscount Simon.

Subsequently to the hearing of the present case in the Court of Session, this House had occasion, in deciding the appeal of *Miller* v. *Glasgow Corporation* (1) to expound afresh the limits of the doctrine of common employment as a defence to the employer of two fellow-servants, one of which negligently injures the other in the course of service, and in the opinions delivered in that case the nature of the test of "common work" was explained. In that appeal, this House in effect adopted the judgment of Lord Justice-Clerk Cooper. I venture to quote from my own opinion in that case, with which the other members of the House agreed, as being the most convenient way of setting out the principles to be applied. I said (2): "'Common work' is not limited to the sharing of "the same task, like the task of two sawyers in a saw-pit, "or of engine-driver and stoker on the footplate of a locomotive: "the phrase covers the case where the work of one is so related "to the work of the other that the risk of injury to the one due "to the carelessness of the other is not merely fortuitous, but "is a special risk involved in the relationship itself, so that such "risk must be deemed to have been in contemplation of the "injured servant when he entered into his contract of service." (By "fortuitous" in traffic cases is meant "the ordinary risk "of contiguous traffic.") "*Radcliffe's* case (3), therefore, "does not support the broad proposition that the defence of "common employment is never available when two vehicles "driven by fellow-servants of the same employer collide in the "high road. If the risk of collision between them is merely the "ordinary risk arising from contiguity in traffic, i.e., the risk "of being run into by another vehicle, whoever is its driver, "then the injured party has no special interest in the skill and "caution of a driver who is his fellow-servant. The risk he "runs is a mere risk of the road in the sense that he might equally "well be run into by anyone else driving in his vicinity. "But if the relation between the work of the two fellow-"servants is such that one of them depends for his safety from "harm in a special degree on the care and skill of the other, "then they are engaged in a 'common work' and the term in "the contract of employment exonerating the common employer "from liability has to be implied." In *Miller's* case (1), the collision occurred between two of the corporation's tram-cars engaged in the same service and following the same uphill route on the same pair of rails. The significant circumstance was that if danger of collision between them arose neither car could avoid it by lateral movement, for each car could move only along the same fixed grooves. It was this circumstance which led the House to take the view, affirming the Court of Session, that the risk of collision was not merely the ordinary risk arising from contiguity in traffic of two vehicles, but that the injured party serving on one tram had a special interest in the skill and caution of the driver of the other tram who was his fellow-servant.

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(1) [1947] A. C. 368.
(2) Ibid. 374.
(3) [1939] A. C. 215.

Every case in this branch of the law depends on its own facts, and fine distinctions are inevitably involved. But in the present case it appears to me that the majority of the judges dealing with the matter in the Court of Session are right, for the risk which the respondent was running from the careless driving of another vehicle which was moving close behind her own bus did not in the least depend on the fact that the vehicle in connexion with which the risk arose was another bus of the corporation. I may point out (without expressing any view as to whether the difference would be material) that the two buses were not drawing up one behind the other at an appointed stopping-place but were both using the road in course of ordinary transit. The decision in *Kerr* v. *Glasgow Corporation* (1) (where the colliding buses were within the precincts of a large garage) indicates that such refinements may be important. But the collision here was a risk of the road which might equally well have arisen if the vehicle which ran into the respondent's bus belonged to somebody else, and was not a corporation bus at all. In other words, the respondent had no "special "interest" in the skill and caution of Pantrini, arising out of the relationship between them, but was the victim of a risk of the road which might equally well have arisen from the negligent conduct of any driver of any vehicle moving close behind her. I move that the appeal be dismissed with costs.

My Lords, my noble and learned friend LORD THANKERTON, who is not able to be present to-day authorizes me to say that he concurs in the opinion I have just delivered.

LORD PORTER. My Lords, the doctrine of common employment is common to the law of England and of Scotland. It has often been considered and sometimes criticized, but it is firmly established and its principles must be followed where they are

(1) 1945 S. C. 335.

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applicable. Its tenets were formulated by counsel for the appellants in the circumstances of the present case in the phrase : " Was the nature of the employment such as to bring " the two buses into association with one another at the time " and place of the accident ? " If this means was the nature of the employment such that there was some particular risk beyond that to which all traffic on the roads is exposed, I should not dissent. But it is not enough that the risk was of a type to which all those carried in a vehicle in a public thoroughfare are exposed. It must arise out of the special relationship between the injured person and the negligent servant of the same employer. The appellants contended that in the present case there was such a peculiar relationship. Two buses, they said, following one another along the same route at an interval of a minute, were at least likely to pass and re-pass one another from time to time and therefore exposed their drivers and conductors to a risk which traffic in general did not share, and they relied on the case of *Miller* v. *Glasgow Corporation* (1) in support of their argument. *Miller's* case (1), however, involved different considerations. There two trams were timed to follow one another immediately and being trams could advance or turn back only on the same line. Inevitably the risk of injury of tram by tram was greater than that of bus or car by another such vehicle. The difference has been analysed by the Lord Justice-Clerk and I need not repeat it. In the present case there was no greater likelihood of injury of bus by bus than there was of damage by any passing vehicle to another. Even if it be accepted that, owing to the interval between their prescribed times being no more than a minute, there was a likelihood of the two buses passing and re-passing, I should still think the risk that to which all traffic in general is exposed. But, indeed, it is possible to take the view that the time-table which seeks to keep the buses apart lessens rather than increases the risk of collision as compared with that to which other traffic is exposed. In my view the nature of the employment of the pursuer was not such as to expose her to any greater risk of injury from a collision between the bus in which she was acting as conductress and the bus which collided with it than from a collision with any other vehicle. There was no especial association juxtaposition or proximity—call it what you will—between the one and the other. For these reasons which but repeat what has been said by the Lord

(1) [1947] A. C. 368.

Justice-Clerk with whose judgment I agree on all points, I would dismiss the appeal.

LORD OAKSEY (read by LORD MACDERMOTT). My Lords, I agree with the motion proposed by the noble Viscount on the woolsack. The question, in my opinion, is whether there was, to use the words of Viscount Simon in *Miller* v. *Glasgow Corporation* (1), any special risk involved in the relationship between the respondent and the driver of bus B. It is argued that the respondent and the driver of bus B were in common employment because the appellants' bus A, on which the respondent was conductress, and the appellants' bus B were due, according to their respective time boards, to pass the same point at an interval of one minute. It is said that it was inevitable that these two buses should pass each other and so come within what may be called colliding distance. I cannot agree that it was inevitable that they should pass each other, though no doubt it was probable. But if the fact of two vehicles of one owner passing each other according to some definite route or some definite time table involves a special risk which gives rise to the doctrine of common employment, then whenever two vehicles belonging to one owner pass each other in that way, however seldom, the risk is a special one which the servants travelling in the vehicles must be held to contemplate. I entirely agree with the Lord Justice-Clerk in the present case and with the Master of the Rolls in *Metcalfe* v. *London Passenger Transport Board* (2) that the risk is not in any sense a special risk and is no more within the contemplation of the servants of a single master than any other traffic risk and that to sustain the plea of common employment in this case would give an incalculable extension to the operation of the doctrine of common employment.

LORD MACDERMOTT. My Lords, much of the appellants' argument was directed to showing that the servants in question were employed upon " common work " by reason of the degree of juxtaposition demanded by the character of their duties. Where an employment is such as to render those engaged therein liable to injury by the negligence of others who are not fellow-servants I am not certain that this test of " common " work " will always suffice, in itself, to decide the applicability of the doctrine now in question, and I incline to the view that

(1) [1947] A. C. 368, 374.

(2) 108 L. J. (K. B.) 733.

on occasion it may be necessary to treat the principle enunciated in *The Petrel* (1), and approved by this House in *Radcliffe* v. *Ribble Motor Services, Ld.* (2) as a distinct criterion. But, however that may be, it is clear that the doctrine cannot constitute a defence if that principle applies and, on the conclusion I have reached, it therefore becomes unnecessary to consider further what the attributes of "common work" are according to the authorities. My Lords, expressed in general terms the principle of *The Petrel* (1) appears to be that a risk must be treated as a general risk, and not a special risk of the employment, and must, therefore, be regarded as outside the implied stipulation on which the doctrine of common employment rests, if it may spring as readily from the fault of those who are not fellow-servants of the injured person as from the fault of those who are. The decision of your Lordships' House in *Miller* v. *Glasgow Corporation* (3), affords a good example of a special risk for there, owing to the nature of the service, what occurred was much more likely to happen through the negligence of a fellow-servant of the injured person than through the negligence of anyone else. Here, the case falls, in my opinion, as clearly on the other side of the line. Despite the proved frequency of the appellants' bus services along the Great Western Road, the risk exemplified by this accident might, on the evidence, have arisen as readily from the fault of some other driver on that busy thoroughfare who was not in the employment of the appellants. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Martin & Co., for Simpson & Marwick, W. S., Edinburgh.*

Solicitors for respondent: *Herbert Smith & Co., for J. & R. A. Robertson, W. S., Edinburgh.*

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(1) [1893] P. 320.
(2) [1939] A. C. 215.
(3) [1947] A. C. 368.

[HOUSE OF LORDS.]

H. L. (E.)*

1947

June 23, 24, 27;
July 24.

FRANKLIN AND OTHERS . . . . APPELLANTS;

AND

MINISTER OF TOWN AND COUNTRY PLANNING . . . . . RESPONDENT.

Town and country planning—New town—Objections to draft order—Public local inquiry—Bias—Functions of Minister—Conduct of inquiry—Town and Country Planning Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 47), *s.* 16, *sub-s.* 1 (*b*)*—New Towns Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 68), *s.* 1, *sub-ss.* 1, 2; *sch. I, para.* 3.

In considering the report of the person who has held a public local inquiry under sch. I., para. 3 of the New Towns Act, 1946, after objections have been made to an order under s. 1, sub-s. 1, of the Act, the Minister of Town and Country Planning has no judicial or quasi-judicial duty imposed on him, so that considerations of bias in the execution of such a duty are irrelevant, the sole question being whether or not he genuinely considered the report and the objections.

The public local inquiry under sch. I, para. 3, is held with respect to the objections only and it is not the duty of the Minister to call evidence in support of the order, since the object of the inquiry is to inform his mind and not to consider any issue between him and the objectors.

Decision of the Court of Appeal (176 L. T. 312) affirmed.

APPEAL from the Court of Appeal (Lord Oaksey, Morton and Tucker L.JJ.).

The facts, stated by Lord Thankerton, were as follows: The appellants were the owners and occupiers of dwelling-houses and land situate at Stevenage. On August 3, 1946, the respondent, Lewis Silkin, as Minister of Town and Country Planning, prepared the draft Stevenage New Town (Designation) Order, 1946, under para. 1 of sch. I to the New Towns Act, 1946, and on or about August 6, 1946, he caused the same to be published and notices to be given as prescribed by para. 2 of sch. I to the Act. Thereafter objections were received from a number of persons, including the appellants. Accordingly, the respondent instructed Mr. Arnold Morris, an inspector of the Ministry of Town and Country Planning, to hold a public local inquiry, as prescribed by para. 3 of the said schedule.

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* *Present:* LORD THANKERTON, LORD PORTER, LORD UTHWATT, LORD DU PARCQ and LORD NORMAND.

Mr. Morris held the inquiry at the Town Hall, Stevenage, on October 7 and 8, 1946, and on October 25 made a report to the respondent in which he set out a summary of the submissions made and the evidence given by and on behalf of the objectors and attached thereto a complete transcript of the proceedings, which began with an opening statement by Mr. Morris giving a brief recapitulation of the reasons that had led to the designation of Stevenage as the site of a new town. On November 11, 1946, the respondent made the order in terms of para. 4 of sch. I to the Act. On December 9, 1946, the appellants, by notice of motion, applied to the High Court to have the order quashed, on the following grounds: "(1). That the said order "is not within the powers of the New Towns Act, 1946, or "alternatively that the requirements of the said Act have not "been complied with and the interests of the [appellants] "have been thereby substantially prejudiced in that— "(A) before considering the objections of the [appellants] "the Minister stated that he would make the said order, and "was thereby biased in any consideration of the said "objections; and (B) the Minister did not before making the "said order cause a public local inquiry to be held with respect "thereto; and (2.) that the New Towns Act, 1946, impliedly "requires that the objections of the [appellants] should be fairly "and properly considered by the Minister and that the Minister "should give fair and proper effect to the result of such "consideration in deciding whether the said order should be "made and that such implied requirements were not complied "with."

In the subsequent litigation there was not much dispute as to the further facts, which, stated chronologically, were as follows: On January 21, 1946, a committee appointed in 1945 by the respondent, as Minister of Town and Country Planning, and the Secretary of State for Scotland, known as the "Reith Com-"mittee," made an interim report, dated January 2, 1946, and published as Command Paper 6759, in which it is stated in para. 16: "(1.) Stevenage is suggested in the Greater London "Plan, 1944, as one of the new towns in the outer ring round "London. We are informed that the development of this town "is a matter of urgency, and that the agency must be chosen "before legislation can be obtained. (2.) It is possible that by "a special arrangement with the Hertfordshire County Council, "at the request of the Minister of Town and Country Planning, "the necessary land may be acquired for the County Council "under s. 35 of the Town and Country Planning Act, 1932, "the Exchequer providing the necessary finance. We recom- "mend that there shall be an arrangement between the County "Council and a government-sponsored corporation established "by Royal Charter, which will enable the latter to proceed in "advance of legislation. (3.) A draft charter for this "corporation, drawn up at our request by the Treasury "Solicitor, is in Appendix 4 (Note: Charters for corporations "established after legislation has been passed would derive "from that legislation and be different in content)." The committee recommended in the ninth place: "*Stevenage.* "Arrangements should be made for setting up immediately a "public corporation for the development of a new town at "Stevenage to proceed with the necessary work in advance of "legislation—para. 16." The New Towns Bill was introduced by the respondent in the House of Commons on April 17, 1946, and was ordered to be printed. On or about April 24, 1946, the respondent sent letters to one hundred and seventy-nine owners of land at Stevenage inquiring whether they were prepared to sell land to the respondent, with a view to the development of the area as a garden city, as provided by s. 35 of the Town and Country Planning Act, 1932. There was no evidence that any land was acquired by the respondent as the outcome of these letters. On May 6, 1946, the respondent attended and spoke at a public meeting in Stevenage Town Hall, called to consider a proposal for designating an area of land in the neighbourhood of Stevenage as the site of a new town. Both the advance press notice, issued by the respondent prior to the meeting, and the speech itself gave a somewhat detailed statement of the development of the plans for relief of density of the population of London by the formation of new towns, and the particular advantages of the Stevenage area for such a purpose. The passages in the press notice founded on by the appellants as demonstrating the state of the respondent's mind, along with the immediate context, were to be found in the respondent's speech, but the speech contained one short additional passage, and the report of the speech also gave some of the interruptions of the audience, and the reactions of the respondent thereto, and recorded that the respondent, on rising to begin his speech, was greeted with cheers from the platform and some booing from the hall. The meeting was a lively one. The relevant passages were as follows: 1. After review of the Abercrombie Plan for Greater London, the interim report of the Reith Committee, the unanimous approval given to build the first new town at Stevenage, and the consideration of the matter by the Government and inter-departmental committees, the respondent said: "I have now had the "advantage of two interim reports—both unanimous—from "this committee" (the Reith Committee), "and based upon "these reports the Government has decided to introduce "legislation to facilitate the creation of these new towns. "The New Towns Bill, published twelve days ago, will receive "its Second Reading on Wednesday, and I am here to-day— "(*Voice:* You are leaving it a bit late.) In anticipation of "the passage of the Bill—and I have no doubt that it will go "through — certain preliminary steps have been taken "regarding Stevenage by way of discussion with some of the "local authorities concerned—(*Voice:* There has been no "discussion with the Stevenage Local Authority)—and the "preparation of a plan, and the giving of notices for the acquisition of land under powers which I already have in pursuance "of the Town and Country Planning Act, 1932." 2. In reference to the choice of the Stevenage area: "I think you "will agree that if we are to carry out our policy of creating a "number of new towns to relieve congestion in London we "could hardly have chosen for the site of one of them a better "place than Stevenage. Now I know that many objections "have been raised by the inhabitants of Stevenage, perhaps "not unnaturally." 3. Later the respondent said, in two passages: "I want to carry out a daring exercise in town "planning—(*Jeers*). It is no good your jeering: it is going to "be done—(*Applause and boos*). (*Cries of* 'Dictator')." "After all this new town is to be built in order to provide for "the happiness and welfare of some sixty thousand men, women "and children . . . . For a number of years we in this country "stood together and suffered together, whilst fighting for an "ideal, for a democracy in which we believed. I am sure that "this spirit is not dead in Stevenage, and, if you are satisfied "that this project is worth while and for the benefit of large "numbers of your fellow human beings, you will be prepared to "play your part to make it a success. The project will go "forward. It will do so more smoothly and more successfully "with your help and co-operation. Stevenage will in a short "time become world famous—(*Laughter*). People from all over "the world will come to Stevenage to see how we here in this "country are building for the new way of life." 4. In answer to a question as to whether the rates would be increased by the development, the respondent said: " No, in due course Stevenage will gain. Local authorities will be consulted all the way " through. But we have a duty to perform, and I am not going " to be deterred from that duty. While I will consult as far " as possible all the local authorities, at the end, if people " are fractious and unreasonable, I shall have to carry out my " duty—(*Voice:* Gestapo!)." The New Towns Bill received a Second Reading in the House of Commons on May 8, 1946, and received the Royal Assent on August 1, 1946. The statutory duty of carrying out the designation of new towns thus became imposed on the respondent as Minister of Town and Country Planning. The draft order for the designation of Stevenage was prepared and published and notices were given. Objections were received and a public local inquiry was held by Mr. Arnold Morris, an inspector of the Ministry, who made a report to the respondent. On November 8, 1946, the respondent caused a letter of fourteen paragraphs to be sent to the objectors in which, after stating that he had considered the report (para. 1) and that " after giving careful consideration to the various " submissions made to him on behalf of interested local " authorities and statutory undertakers and by private individuals affected by the proposals," he had decided to make the order, (para. 2), he dealt in turn with the main objections raised, viz., as to site, the possibility of expanding other towns, the danger of coalescing with neighbouring towns, the nearness to London, the disturbance of agricultural land, exposure to cold winds in winter, the effect on certain neighbouring woodlands, etc. In para. 13 the respondent referred to the problems of water supply and sewage disposal and the possible effect on London's water supplies and said of the representations made by the Metropolitan Water Board, the Lee Conservancy Board and the Lee Conservancy Catchment Board that " these " problems have been taken into account from the beginning " and have been the subject of discussions with the Ministry of " Health from an early stage and subsequently with the Metropolitan Water Board and the Lee Conservancy Board. " After carefully examining the representations made to him " the Minister feels justified in going forward with the establishment of a properly constituted community and will maintain " close contact with the Ministry of Health and the statutory " undertakers at every stage of the development . . . . The " Minister has accordingly appointed a consultant to examine "the possibilities of a scheme which will apply to a much "wider area than that of the immediate vicinity of Stevenage." The respondent having made the order, the appellants on December 9, 1946, applied to the High Court to have it quashed. On January 21, 1947, the respondent swore an affidavit, which was not challenged, stating (inter alia): "Before causing "the said order to be made, I personally carefully considered all "the objections made by the objectors including the present "[appellants] together with the submissions made and evidence "given on their behalf as appearing in the said transcript" (of the proceedings at the inquiry). "I also carefully con-"sidered the report of the said Arnold Morris."

Henn Collins J. quashed the order holding that, though the respondent had not acted ultra vires, he had not fulfilled his duty to act judicially in considering the objections. The Court of Appeal reversed this decision, holding that the appellants had not discharged the onus of proving that the respondent was biased when he made the order. The appellants appealed to the House of Lords.

Capewell K.C. and *Squibb* for the appellants. The order is challenged on two grounds (*a*) that the respondent was biased, i.e., that he did not approach the public inquiry and the confirmation of the order with a mind open to conviction; bias is alleged in the sense in which it is used in the authorities, as a state of mind preventing fair consideration of the matter, so that there was lack of bona fides in the respondent in dealing with the matter and the jurisdiction to make the order, with which the Act of 1946 would otherwise have clothed him, was completely wanting; (*b*) that no proper local inquiry was held as required by the Act of 1944 and in consequence the appellants were substantially prejudiced. As to the first point, the evidence taken all together showed conclusively what was the respondent's state of mind with regard to the order. There was ample evidence from which the inference might be drawn that he had so made up his mind that nothing was going to change it: see the report of the Reith Committee; the respondent's letters of April 24, 1946; the wording of the advance press notice of his speech on May 6, 1946, and especially the speech itself. His state of mind before the Act of 1946 came into force is relevant; when he made the speech he had already introduced the New Towns Bill into Parliament. In law the respondent had a duty to decide a certain issue, viz., whether or not the draft order should be confirmed. In so doing he was obliged to hold a public local inquiry. In the discharge of his duty he had to act fairly according to the principles of natural justice. Not only had he so to act; he had also to appear to be so acting. He was under a duty to consider the objections judicially or quasi-judicially and to deal with the report accordingly. The test to be applied to his conduct is not a critical examination of all the evidence which may subsequently become available after he has given his decision and that decision has been challenged. It is whether or not his conduct, so far as it was public knowledge up to the moment of his decision, would satisfy a reasonable man that justice manifestly appeared to have been done: see *Errington* v. *Minister of Health* (1); *R.* v. *Essex Justices* (2) and *R.* v. *Sussex Justices* (3). By s. 16, sub-s. 2, of the Act of 1944 an objector is deprived of the right of resort to prohibition and certiorari and s. 16, sub-s. 1, provides alternative machinery in operating which the respondent was bound to act judicially. The respondent displayed bias in not approaching the case with a mind open to conviction. He acted unfairly in that he had already made up his mind unalterably in favour of the scheme and meant to confirm the order, whatever the force of the objections might be, so that he gave the matter no genuine consideration. This appeared particularly from his speech at the meeting. Further, in the letter of November 8, 1946, he did not deal adequately with the objections. In particular in para. 13 he failed to deal effectively with the problems of water supply and sewage disposal and the discussions alleged were inadequate. These matters were vital to the practicability of the whole scheme. This case is outside *Liversidge* v. *Anderson* (4) because there lack of bona fides was not alleged. On the second point, the respondent did not in fact hold a proper inquiry as required by the Act of 1946, reading para. 3 of sch. I along with s. 19, sub-s. 3, which incorporates s. 51, sub-s. 2, of the Act of 1944, while this incorporates s. 290, sub-ss. 2 to 5 of the Local Government Act, 1933. This indicates the law applicable to such inquiries. The procedure is altogether different from that of a hearing before "a person "appointed for the purpose by the Minister" as laid down in paras. 5 and 6 of sch. I to the Act of 1944. By para. 3 of sch. I to the Act of 1946 "a public local inquiry" is prescribed

(1) [1935] 1 K. B. 249.
(2) [1927] 2 K. B. 475.
(3) [1924] 1 K. B. 256.
(4) [1942] A. C. 206.

and that is more than a hearing before "a person appointed." It is a proceeding in which both parties must participate and evidence must be adduced in favour of the scheme to give the objectors the chance of cross-examining someone. It would be farcical if they could only indulge in shadow boxing and had only the right to fulminate in public. There would then be no distinction between a hearing before a person appointed and a public local inquiry. There cannot be such an inquiry in the proper sense unless there is the possibility of questioning matters of policy. Admittedly *In re Trunk Roads Act,* 1936, *and the London-Portsmouth Trunk Road* (*Surrey*) *Compulsory Purchase Order* (*No.* 2), 1938 (1) is against the appellants. It was wrongly decided. [They also referred to the Acquisition of Land (Authorization Procedure) Act, 1946.]

Squibb following. In performing his functions under para. 3 of sch. I to the Act of 1946 the respondent had to act fairly towards the objectors and to do justice. In that respect he was in no different position from anyone else on whom is conferred a public duty to decide matters affecting the interests of other parties. A judge is disabled from performing his function if he has any defect of mind which by its very nature may interfere with the discharge of that function. A mere inclination of mind, or what is commonly called bias, disentitles him to act. Admittedly the respondent must when he made the draft order have believed that the new town was a sound thing and to that extent he must have been biased but that did not relieve him of the duty of deciding the matter fairly. A Minister in performing such a public duty as this and a judge performing his function must both not only act fairly but also appear to act fairly; they must perform their respective functions so as to inspire confidence that justice is done, for it is not the tipstaff or the bailiff who secure obedience to the courts but the public confidence that justice is done by their decisions. If before trying a case a judge were to say: "I know "the prisoner is guilty and I mean to punish him" that would indicate bias. The respondent is in an analogous position. The appellants must succeed in their appeal if the respondent either had a closed mind or seemed to have a closed mind. This case is different from *Ranger* v. *Great Western Ry. Co.* (2) and *Jackson* v. *Barry Ry. Co.* (3) in that an Act of Parliament such as this is not on all fours with a bargain between private parties but imposes a public duty which calls for a higher standard of conduct in the person designated to make the decision. *R.* v. *Essex Justices* (1) applies. Here the respondent was unfair in that before the inquiry, he had made up his mind that Stevenage would be a new town, no matter what the objections and thus he did not approach the problem honestly. His fundamental wrongheadedness is illustrated by his reference to having " a duty to perform," in his answer to a question. That showed a complete misconception as to the nature of his duty. It was his duty, not to make Stevenage a new town, but to reach a proper decision. His affidavit should be disregarded.

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(1) [1939] 2 K. B. 515.

(2) (1854) 5 H. L. C. 72, 89.

(3) [1893] 1 Ch. 238, 244.

[LORD THANKERTON. Mr. Attorney, their Lordships do not find it necessary to hear you but, if there is any additional authority you wish us to consider, would you let us know ?]

Sir Hartley Shawcross A.-G. and *Hubert Parker* for the respondent. *In re Plymouth* (*City Centre*) *Declaratory Order,* 1946. *Robinson* v. *Minister of Town and Country Planning* (2) indicates that it is idle to talk of natural justice in a case of this kind or of any necessity for an appearance of justice. If that were so *Liversidge* v. *Anderson* (3) could not have been decided as it was nor could innumerable cases under the Defence Regulations : see also *Point of Ayr Collieries, Ld.* v. *Lloyd-George* (4). In those cases the Ministers refused to disclose their reasons for their action, while the objectors put forward reasons, the only ones known to the public, suggesting that the Minister's conclusions were wrong and unfair. There was no appearance of justice in what was done. It was held that if the Minister was satisfied, the matter was a subjective one for him and that, unless it could be shown that he acted in bad faith, his decision stood.

THE HOUSE took time for consideration.

July 24. LORD THANKERTON. My Lords, the appellants, who are the owners and occupiers of dwelling-houses and land situate at Stevenage, challenge the validity of the Stevenage New Town (Designation) Order, 1946, made on November 11, 1946, by the respondent, under the New Towns Act, 1946, which had received the Royal Assent on August 1, 1946. This challenge is made under s. 16 of the Town and Country Planning Act, 1944, which provides by sub-s. 1 (*b*) that the court

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(1) [1927] 2 K. B. 475, 488.
(2) [1947] K. B. 702, 710.
(3) [1942] A. C. 206.
(4) [1943] 2 All E. R. 546.

H. L. (E.)

1947

FRANKLIN
v.
MINISTER OF
TOWN AND
COUNTRY
PLANNING.

Lord
Thankerton.

"if satisfied that the order or any provision therein . . . . "is not within the powers of this Act or that the interests of the "applicant have been substantially prejudiced by any requirement of this Act or of any regulation made thereunder not "having been complied with, may quash the order or any "provision contained therein . . . . either generally or in so "far as it affects any property of the applicant." The relevant provisions of the New Towns Act, 1946, are as follows: "1. (1.) If the Minister is satisfied, after consultation with any "local authorities who appear to him to be concerned, that it is "expedient in the national interest that any area of land should "be developed as a new town by a corporation established "under this Act, he may make an order designating that area "as the site of the proposed new town. (2.) The provisions "of sch. I to this Act shall have effect with respect to the "procedure to be followed in connexion with the making of "orders under this section; and ss. 16 and 17 of the Town and "Country Planning Act, 1944 (which relate respectively to the "validity and date of operation of orders under s. 1 of that Act, "and to the registration of such orders in the register of local "land charges) shall apply to an order made under this section "as they apply to an order made under s. 1 of that Act." The relevant provisions of sch. I as to orders under s. 1 are as follows: "1. Where the Minister proposes to make an order "under s. 1 of this Act, he shall prepare a draft of the order, "describing the area to be designated as the site of the proposed "new town by reference to a map, either with or without "descriptive matter (which, in the case of any discrepancy "with the map, shall prevail except in so far as may be otherwise provided by the draft order) together with such statement as the Minister considers necessary for indicating the size "and general character of the proposed new town. 2. Before "making the order the Minister shall publish in the London "Gazette, in one or more newspapers circulating in the locality "in which the proposed new town will be situated, and in such "other newspapers, if any, as he considers appropriate in the "circumstances, a notice—(*a*) describing the area to be designated as the site of the proposed new town; (*b*) stating that "the draft of an order under s. 1 of this Act has been prepared "by the Minister in relation thereto and is about to be "considered by him; (*c*) naming a place within the said area "where a copy of the draft order (including any map or "descriptive matter annexed thereto) and of the statement

" required by the foregoing paragraph, may be seen at all " reasonable hours; and (*d*) specifying the time (not being less " than twenty-eight days from the publication of the notice in " the Gazette) within which, and the manner in which, " objections to the proposed order may be made, and shall, " not later than the date on which the notice is published " in the Gazette, serve a like notice on the council of the county " and of the county district in which the land, or any part of " the land, to which the order relates is situated, and on any " other local authority who appear to him to be concerned with " the order. 3. If any objection is duly made to the proposed " order and is not withdrawn, the Minister shall, before making " the order, cause a public local inquiry to be held with respect " thereto, and shall consider the report of the person by whom " the inquiry was held. 4. Subject to the provisions of the " last foregoing paragraph the Minister may make the order " either in terms of the draft or subject to such modifications " as he thinks fit: Provided that, except with the consent of " all persons interested, the Minister shall not make the order " subject to a modification including in the area designated as " the site of the proposed new town any land not so designated " in the draft order." Section 16 of the Town and Country Planning Act, 1944, thus incorporated by s. 1, sub-s. 2, of the Act of 1946, restricts the remedy open to any person desiring to challenge the validity of an order, or of any provision therein, to the ground that it is not within the powers of the Act or that some requirement of the Act has not been complied with so that he must proceed by application to the High Court, as therein provided, and he requires to satisfy the court that the order is not within the powers of the Act, or that his interests have been substantially prejudiced by any requirement of the Act not having been complied with.

There does not appear to be much dispute as to the facts, but a great deal rests on the proper inference to be drawn from these facts. On January 21, 1946, a committee appointed in 1945 by the respondent, as Minister of Town and Country Planning, and the Secretary of State for Scotland, known as the " Reith Committee," made an interim report, dated January 21, 1946. The committee recommended: " Arrangements should " be made for setting up immediately a public corporation for " the development of a new town at Stevenage to proceed with " the necessary work in advance of legislation." The New Towns Bill was introduced by the respondent in the House of

Commons on April 17, 1946, and was ordered to be printed. On or about April 24, 1946, the respondent sent letters to one hundred and seventy-nine owners of land at Stevenage inquiring whether they were prepared to sell land to the respondent, with a view to the development of the area as a garden city, as provided by s. 35 of the Town and Country Planning Act, 1932. There is no evidence that any land was acquired by the respondent as the outcome of these letters, and we are entitled to assume that the Minister was acting on the suggestion of the Reith Committee, and that the proposal was superseded by the passage of the New Towns Act. On May 6, 1946, the respondent attended and spoke at a public meeting in Stevenage Town Hall, called to consider a proposal for designating an area of land in the neighbourhood of Stevenage as the site of a new town. The appellants base their case mainly on the statements made in an advance press notice issued by the respondent prior to the meeting, and statements made by the respondent in the course of his speech, as evidence that the respondent had by that time completely made up his mind that the designation of Stevenage as a new town would be carried through, whatever was said at the meeting or subsequently.

The New Towns Bill received a second reading in the House of Commons on May 8, 1946, and received the Royal Assent on August 1, 1946. The statutory duty of carrying out the designation of new towns thus became imposed on the respondent as Minister of Town and Country Planning. Under para. 1 of sch. I to the Act, the respondent prepared, on August 3, 1946, a draft order for the designation of the Stevenage area, and on or about August 6, 1946, caused the draft Stevenage New Town (Designation) Order, 1946, to be published and notices to be given as prescribed by para. 2 of the schedule. Objections were thereafter received, and, on the instructions of the respondent, a public local inquiry was held by Mr. Morris on October 7 and 8, 1946, and Mr. Morris made a report to the respondent on October 25, 1946. It was conceded by the appellants that there was no evidence of any person having been deterred from lodging objections by any of the facts already stated, and there is no criticism of the conduct of the inquiry by Mr. Morris except that which is involved in the other contention of the appellants as to the range of the inquiry, which is claimed by them not to have been in compliance with the statutory requirements. On November 8, 1946, the respondent caused a letter to be sent to the objectors, in which, after stating that he had considered Mr. Morris's report, and that, after giving careful consideration to the various submissions made to him on behalf of interested local authorities and statutory undertakers and by private individuals affected by the proposals, he had decided to make the order. The respondent, in fourteen paragraphs, dealt in turn with the main objections raised. The appellants sought to maintain that, in para. 13, the respondent had not effectively dealt with the objections raised by the Metropolitan Water Board, the Lee Conservancy Board and the Lee Conservancy Catchment Board as to water supply and sewage disposal, which the appellants contended were vital to the practicability of the whole proposal, but only stated that he had appointed a consultant to examine the possibilities of a scheme which will apply to a much wider area than that of the immediate vicinity of Stevenage. In my opinion this contention of the appellants was correctly disposed of by Lord Oaksey L.J., who pointed out (1) that none of these authorities had ever suggested that it was an entirely unpracticable scheme, and that it really raised a question of expense. The respondent said that these problems had been taken into account from the beginning and had been the subject of discussions with the Ministry of Health from an early stage and subsequently with the Metropolitan Water Board and the Lee Conservancy Board. (The appellants seek to throw doubt on the statement as to discussion with these two boards.) The respondent adds that he feels justified in going forward with the establishment of a properly planned community and would maintain close contact with the Ministry of Health and the statutory undertakers at every stage of the development. From this it is clear that the respondent, after very long and full consideration of the matter, came to the conclusion that these objections were in no degree fatal to the scheme, but were matters to be examined and determined during the stage of development of the new town, which comes after the making of the order, when the development corporation is established under s. 2 of the Act. The appellants admit that, if the respondent did so decide, his decision is not open to challenge by them. It may further be observed that, during this later stage, the Minister of Health, under s. 9 of the Act, has the power, on his own initiative, of constituting larger areas than the designated area for the purposes of public health. It appears to me that the respondent's letter of November 8 not only does not support the appel-

(1) (1947) 176 L. T. 312, 314.

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lants' contention, but that it is evidence that the Minister had properly considered the objections.

The Stevenage New Town (Designation) Order was made by the respondent in terms of para. 4 of sch. I to the Act, and its validity is the subject of challenge in these proceedings. Henn Collins J. upheld the first contention of the present appellants on the ground that the respondent's functions in considering the report of Mr. Morris's inquiry were quasi-judicial, that he did not consider the objections with an open mind, and that (1.) "he did not consider or decide the question aye or no "should the order be confirmed with an open mind, but "that he meant to confirm it whatever the force of the "objections might be, trusting that some solution would be "found." The learned judge based his view on the respondent's speech of May 6, 1946, and on para. 13 of the respondent's letter of November 8. As regards the former, he says (1): "If I am to judge by what he said at the public meeting which "was held very shortly before the Bill, then published, became "an Act of Parliament, I could have no doubt but that any "issue raised by objectors was forejudged. The Minister's "language leaves no doubt about that. He was not saying "there must be and shall be satellite towns, but he was saying "that Stevenage was to be the first of them. But, when he "made that speech, and gave his answers to questions which "were asked, he had no administrative functions in relation to "the Act in question, for the Act had not then been passed. "Though that was his attitude two days before the Bill received "its second reading, it is upon the objectors to prove that the "Minister was in a like mind, or at least had not an open mind, "from and after, at latest, the inception of the public inquiry, "which was held in October, 1946." As regards the letter of November 8, 1946, the learned judge says (1): "In this case, "however, as was only to be expected of him, the Minister has "dealt, in writing, with the substance of the objections—with "one exception, namely, that directed to the difficulties of "water supply and sewage disposal. It is obvious that those "difficulties must be met before the scheme can go through. "The Minister acknowledges that they have not been met, and "that he is taking advice as to how it can be done. Non con"stat that any way will be found. And yet, with that funda"mental problem still outstanding, the Minister confirms his "order. How can it be said that he weighed the objection with

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(1) 176 L. T. 200, 203.

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"an open mind when he acknowledges that he did not and does "not know the force of it? When, therefore, I ask myself "whether the objectors have satisfied me that from and after "the inception of the inquiry up to and including the moment "at which the Minister decided to confirm his order, he had "not an open mind, my answer is that they have." It is clear that had the learned judge appreciated, as was pointed out in the Court of Appeal, that no witness had suggested that the scheme could not go through, unless the suggested difficulties of water supply and sewage disposal had been met, and had he realized that he had put a wrong construction on para. 13 of the letter of November 8, 1946, he would not only have been left without any evidence that from and after the inception of the inquiry up to and including the confirmation of the order the respondent had not an open mind, but he would have had the evidence of the letter of November 8, 1946, that the respondent had so considered the report, and he should also have taken account of the unchallenged affidavit of the respondent on January 21, 1947, referred to by the Court of Appeal that "before causing the said order to be made, I personally carefully "considered all the objections made by the objectors including "the present applicants, together with the submissions made "and evidence given on their behalf as appearing in the said "transcript. I also carefully considered the report of the said "Arnold Morris." The learned judge makes no reference to this affidavit. In that aspect of the evidence it appears that the learned judge in view of his reasoning, as above quoted, would not have quashed the order. The Court of Appeal accepted this view of the reasoning of the learned judge, and, while assuming that his inference from the respondent's speech of May 6, 1946, that the respondent had not then an open mind and that any issue raised by the objectors was forejudged was well-founded, held that the learned judge's statement of the evidence of the objectors as to water supply and sewage disposal was incorrect, it not having been suggested that the scheme was entirely impracticable, and on his erroneous construction of the letter of November 8, 1946, set aside the decision of Henn Collins J. and restored the Stevenage New Town (Designation) Order of the present respondent.

My Lords, I agree with the decision of the Court of Appeal, but I am of opinion that an incorrect view of the law applicable in this case was taken by the learned judge, and I feel bound, despite the assumption of its correctness by the Court of Appeal, Lord Thankerton.

to examine the correctness of the learned judge's view as to the proper inference from the respondent's speech of May 6, 1946. While the fact that the speech was made just before the second reading of the Bill, and some months before the statutory duties as to designation of new towns was imposed on the respondent has some bearing on the fair construction of the speech, I am prepared to assume in favour of the appellants that, under the Bill as introduced, it was proposed to impose these duties on the respondent, as Minister of Town and Country Planning, and that these duties presented no material difference from those contained in the Bill when passed into law. It could hardly be suggested that, prior to its enactment, he was subject to any higher duty than is to be found in the statute. In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under s. 1 of the Act and sch. I thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of or steps in, discharge of that duty. It is obvious that, before making the draft order, which must contain a definite proposal to designate the area concerned as the site of a new town, the respondent must have made elaborate inquiry into the matter and have consulted any local authorities who appear to him to be concerned, and obviously other departments of the Government, such as the Ministry of Health, would naturally require to be consulted. It would seem, accordingly, that the respondent was required to satisfy himself that it was a sound scheme before he took the serious step of issuing a draft order. It seems clear also, that the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by someone other than the respondent, to whom that person reports, was for the further information of the respondent, in order to the final consideration of the soundness of the scheme of the designation ; and it is important to note that the development of the site, after the order is made, is primarily the duty of the development corporation established under s. 2 of the Act. I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report. On this contention of the appellants no suggestion is made that the public inquiry was not properly conducted, nor is there any criticism of the report by Mr. Morris

In such a case the only ground of challenge must be either that the respondent did not in fact consider the report and the objections, of which there is here no evidence, or that his mind was so foreclosed that he gave no genuine consideration to them, which is the case made by the appellants. Although I am unable to agree exactly with the view of the respondent's duty expressed by the learned judge, or with some of the expressions used by the Court of Appeal in regard to that matter, it does appear to me that the issue was treated in both courts as being whether the respondent had genuinely considered the objections and the report, as directed by the Act.

My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute. As Lord Cranworth L.C. says in *Ranger* v. *Great Western Ry. Co.* (1): "A judge ought to be, "and is supposed to be, indifferent between the parties. He "has, or is supposed to have, no bias inducing him to lean to "the one side rather than to the other. In ordinary cases it is "a just ground of exception to a judge that he is not indifferent, "and the fact that he is himself a party, or interested as a "party, affords the strongest proof that he cannot be "indifferent." To this may be added the statement by Lord Hewart C.J. in *Rex* v. *Sussex Justices. Ex parte McCarthy* (2): "It is said, and, no doubt, truly, that when that gentleman" (the deputy clerk) "retired in the usual way with the justices, "taking with him the notes of the evidence in case the justices "might desire to consult him, the justices came to a con-"clusion without consulting him, and that he scrupulously "abstained from referring to the case in any way. But while "that is so, a long line of cases shows that it is not merely of "some importance but is of fundamental importance that "justice should not only be done, but should manifestly and "undoubtedly be seen to be done. The question therefore is "not whether in this case the deputy clerk made any obser-"vation or offered any criticism which he might not properly

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(1) 5 H. L. C. 72, 89.

(2) [1924] 1 K. B. 256, 258.

" have made or offered; the question is whether he was so " related to the case in its civil aspect as to be unfit to act as " clerk to the justices in the criminal matter. The answer to " that question depends not upon what actually was done but " upon what might appear to be done." This was followed in *Rex* v. *Essex Justices. Ex parte Perkins* (1). But, in the present case, the respondent having no judicial duty, the only question is what the respondent actually did, that is, whether in fact he did genuinely consider the report and the objections.

Coming now to the inference of the learned judge from the respondent's speech on May 6, that he had not then a mind open to conviction, the learned judge states it thus (2): " If I am " to judge by what he said at the public meeting which was " held very shortly before the Bill, then published, became an " Act of Parliament, I could have no doubt but that any issue " raised by objectors was forejudged. The Minister's language " leaves no doubt about that. He was not only saying there " must and shall be satellite towns, but he was saying that " Stevenage was to be the first of them." It seems probable that the learned judge's mind was influenced by his having already held that the respondent's function was quasi-judicial, which would raise the question of bias, but, in any view, I am clearly of opinion that nothing said by the respondent was inconsistent with the discharge of his statutory duty, when subsequently objections were lodged, and the local public inquiry took place, followed by the report of that inquiry, genuinely to consider the report and the objections. The only passages in the speech quoted in the appellants' case are contained in the third quotation I have made from the speech, and are as follows: " I want to carry out in Stevenage a daring " exercise in town planning (*jeers*). It is no good your jeering: " it is going to be done . . . . After all this new town is to be " built in order to provide for the happiness and welfare of some " sixty thousand men, women and children . . . . The " project will go forward, because it must go forward. It will " do so more surely and more smoothly and more successfully " with your help and co-operation. Stevenage will in a short " time become world famous. People from all over the world " will come to Stevenage to see how we here in this country are " building for the new way of life." The only two additional passages founded on by the appellants' counsel at the hearing before this House were the sentence in my first quotation,

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(1) [1927] 2 K. B. 475.

(2) 176 L. T. 200, 203.

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"In anticipation of the passage of the Bill—and I have no "doubt that it will go through," and, in my fourth quotation, "But we have a duty to perform, and I am not going to be "deterred from that duty. While I will consult as far as "possible all the local authorities, at the end, if people become "fractious and unreasonable I shall have to carry out my "duty—(*Voice:* Gestapo!)." My Lords, these passages in a speech, which was of a political nature, and of the kind familiar in a speech on second reading, demonstrate (1.) the speaker's view that the Bill would become law, that Stevenage was a most suitable site and should be the first scheme in the operation, and that the Stevenage project would go forward, and (2.) the speaker's reaction to the hostile interruptions of a section of the audience. In my opinion, these passages are not inconsistent with an intention to carry out any statutory duty imposed on him by Parliament, although he intended to press for the enactment of the Bill, and thereafter to carry out the duties thereby involved, including the consideration of objections which were neither fractious nor unreasonable. I am, therefore of opinion that the first contention of the appellants fails, in that they have not established either that in the respondent's speech he had forejudged any genuine consideration of the objections or that he had not genuinely considered the objections at the later stage when they were submitted to him.

The remaining contention of the appellants is that the inquiry held by Mr. Morris did not comply with the statutory requirements for such a local public inquiry, in respect that no evidence in support of the draft order was led on behalf of the respondent. This contention rests on para. 3 of sch. I to the New Towns Act, 1946, read along with s. 19, sub-s. 3, of the Act, which incorporates, inter alia, as to local inquiries s. 51, sub-s. 2, of the Town and Country Planning Act, 1944, which, in turn, incorporates sub-ss. 2 to 5 of s. 290 of the Local Government Act, 1933, which relate to the giving of evidence on, and defraying the costs of, local inquiries. The terms of para. 3 of sch. I to the Act of 1946, may conveniently be recalled: "If any "objection is duly made to the proposed order and is not "withdrawn the Minister shall, before making the order, cause "a public local inquiry to be held with respect thereto, and shall "consider the report of the person by whom the inquiry was "held." It has been held in both courts below that the words "with respect thereto" mean "with respect to the objections," and the appellants did not challenge that construction in this

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House. In the only analogous case of *In re Trunk Roads Act,* 1936, *and the London-Portsmouth Trunk Road* (*Surrey*) *Compulsory Purchase Order* (*No.* 2), 1938 (1), generally known as the *Kingston By-pass* case, it was held that, under similar statutory provisions, other than the absence of the words "in "respect thereto," it was not the duty of the Minister to call evidence before the inquiry, but the duty of the objectors to state their objections and call such evidence as they might be advised. While I find no reason to doubt the correctness of that decision, which was admittedly contrary to the present appellants' contention, the words "in respect thereto," here present, definitely limit the scope of the inquiry, and none of the general procedural provisions of s. 290 of the Local Government Act, 1933, can be held to extend its scope. As I have already pointed out, the object of the inquiry is further to inform the mind of the Minister, and not to consider any issue between the Minister and the objectors; that is for the Minister thereafter to consider and decide. Accordingly, I am of opinion that this contention of the appellants also fails.

In my opinion, the appeal should be dismissed and the judgment of the Court of Appeal should be affirmed. The appellants should pay the respondent's costs of this appeal.

My Lords, my noble and learned friends LORD PORTER and LORD UTHWATT have desired me to express their concurrence in the opinion which I have just delivered.

LORD DU PARCQ: My Lords, I concur.

LORD NORMAND: My Lords, I also concur.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co.*
Solicitor for respondent: *Treasury Solicitor.*

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(1) [1939] 2 K. B. 515.

[HOUSE OF LORDS]

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April 17, 18, 21, 22, 24; *July* 2.

STENOR, LIMITED . . . . APPELLANTS;

AND

WHITESIDES (CLITHEROE), LIMITED RESPONDENTS.

Design — Infringement — Validity — "New or original" — Merely functional device—Patents and Designs Acts, 1907–1942—*Act of* 1907 (7 *Edw.* 7, *c.* 29), *s.* 49, *sub-s.* 1, *s.* 93 (*as amended*).

In January, 1939, the appellants registered a design under the Patents and Designs Acts in class I. of sch. III. of the Designs Rules, 1932, viz.: "articles composed wholly of metal or in which metal "predominates, and jewellery," the certificate describing it as being "in respect of the application of such design to a metal cut-"out or fuse for use in a vulcanizing apparatus." Subsequently they brought an action, for alleged infringement of their copyright, against the respondents, who contended (*a*) that the design was not "new or original" within s. 49, sub-s. 1, of the Act of 1907 (as amended), because the features of shape and configuration which distinguished it had been anticipated in other metal articles used for other purposes, and (*b*) that this was not a "design" within the definition contained in s. 93, being "a mere mechanical device."

Held that the design was not "new or original," since, in order to disprove novelty or originality, it was enough to show that any other article in class I though used for an entirely different purpose, was already known to be made according to a design with substantially the same features of shape.

Held, further, that the article was "a mere mechanical device," since all the features of the shape were determined solely by the function to be performed by the article to which the shape was applied and, accordingly, there was no registrable "design."

Judgment of Lindley L.J. in *In re Clarke's Design* [1896] 2 Ch. 38, 41; 13 R. P. C. 351, 357, explained.

Decision of the Court of Appeal (63 R. P. C. 81) affirmed.

APPEAL from a decision of the Court of Appeal (Lord Greene M.R., du Parcq and Morton L.JJ.).

The facts, summarized from their Lordships' opinions, were as follows: A design, No. 833097, was registered under the Patents and Designs Act on January 25, 1939, in the name of Leonard Steiner, the predecessor in title of the appellants. It was registered in class I of sch. III of the Designs Rules, 1932 (St. R. & O. 1932, No. 872) made by the Board of Trade under s. 86, sub-s. 1 (*a*), of the Acts as then in force. That class consisted of: "Articles composed wholly of metal or in which "metal predominates, and jewellery." The certificate issued in respect of the design certified that it had been registered "in respect of the application of such design to a metal cut-"out or fuse for use in a vulcanizing apparatus." The drawing attached to the certificate showed a cylindrical rod carrying at each of two places along its length a bevelled collar which increased the diameter of the rod where it occurred by about a third. The two collars were similar to one another and were placed symmetrically from one or other end of the rod at a distance which was somewhat less than a third of the rod's length. The middle section of the rod was slightly thicker between the two collars than where it protruded beyond either of them. The drawings themselves measured several inches in length but the actual object produced by the appellants as embodying the design was in length rather smaller than an ordinary thumbnail in length. In Steiner's patent specification No. 533816 of 1939, relating to improvements in vulcanizing machines for repairing motor-vehicle tyres, the particular advantage of the machine was said to lie "in the "fact that the circuit can only be closed with the aid of the "fusible element and only fusible elements of the pre-"determined correct shape . . . . can be inserted into the "casing." It was further stated that the insertion slot "corresponds in profile with the shape of the fuse member." Figure 5 depicted exactly the same two-collared rod as was shown in Registered Design No. 833097. The provisional specification, No. 522543 of 1938, stated that "the correct "fuse will therefore constitute a kind of key for operating the "switch mechanism which cannot be operated by an "incorrect key." The appellants brought an action in the Chancery Division of the High Court against the respondents claiming relief in respect of alleged infringement by the respondents of the appellants' copyright in this registered design. By their defence the respondents denied infringement and, further, relied on the provisions of s. 54, sub-s. 1, of the Patents and Designs Act, 1907. By their counterclaim they alleged that the registered design was at all material times invalid and counterclaimed for rectification. Their particulars of objections were as follows: "(1.) The said design does not "contain any feature or features applied thereto by any "industrial process or means which in the finished article "appeals or appeal to and is or are judged solely by the eye.

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* *Present:* VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

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" (2.) If, which is denied, the said design does contain any such " feature or features, such feature or features is or are modes or " principles of construction or alternatively constitute in " substance a mere mechanical device. (3.) The said device " was neither new nor original at the date of registration " thereof . . . ." It was not contended that the design had previously been applied to a fuse but it was alleged and established by the evidence that it was common in mechanical engineering practice to provide collars on bars or rods of metal, such as rollers used in rolling mills or shafts for gear boxes or bicycle cranks, all of them metal articles falling within class I. In particular, a bicycle crank was exhibited at the trial, which established that the features of shape and configuration distinguishing the design applied to the appellants' fuse had been anticipated in other metal articles. Romer J., on the issues of infringement and on the defence raised under s. 54, sub-s. 1, found as a fact that the sale by the respondents of articles alleged to infringe the appellants' copyright occurred in circumstances which would, in any case, disentitle the appellants to recover any penalty or damages, and he further held (*a*) that at the time of its registration the design was not a " new or " original design not previously published in the United " Kingdom," within s. 49, sub-s. 1, of the Act, and (*b*) that it was not a " design " at all within the meaning of the Act, because it was so minute that its shape could not be adequately apprehended by ordinary human vision, unassisted by a magnifier. Accordingly, he ordered that the action be dismissed and on the counterclaim directed that the Register of Designs should be rectified by removing from it Design No. 833097. Before the Court of Appeal the appellants did not challenge the decision that the action should be dismissed but they appealed against the order on the counterclaim. The court did not find that the actual object produced by the appellants as embodying the design was so tiny that its shape could not be apprehended by the eye and they did not agree that the alleged design was not registrable because it was intended to be applied to an article of so small a size. They upheld the cancellation on the ground, not dealt with by Romer J., that the alleged design, as applied to the article specified in the certificate was something " which " is in substance a mere mechanical device," and thus was not included in the definition of " design " in s. 93 of the Act. The appellants appealed to the House of Lords. The relevant statutory provisions are set out in the opinion of Lord Porter.

Shelley K.C. and *James Mould* for the appellants. To infringe the copyright in a registered design one must either make something according to that design, i.e., apply it, or else knowingly sell something to which the design has been wrongfully applied. The respondents have contended that, though no one ever made a fuse of this shape before, yet that shape as applied to metal is quite old, e.g., in the case of a bicycle crank axle: see the scale drawing at p. 127 of the appendix to the printed case. They contended that because this has a somewhat similar shape to the registered design, the registration is therefore bad. They also said that putting collars on rods is a well-known device in industry, e.g., in rolling mills. This argument is fallacious because to invalidate a design one must show that it has been used in connexion with articles of a similar type to the article specified in the certificate of registration and the design in question is novel because no fuse, for a vulcanizing machine has been disclosed as having been made in a similar shape. Identity of shape previously applied to articles of quite a different type and not in the same field although falling within the same class, is not enough to destroy the validity of the appellants' claim that the registered design is "new or original" within s. 49, sub-s. 1, of the Patents and Designs Act. No previous application of the design to another article in class I. amounts to an anticipation unless that article is analogous to the one mentioned in the certificate, i.e., unless it is of the same type and made for a similar use or purpose. Though the shape may have been already applied to other articles in the same class, registration may be granted in respect of the novel application of the same shape to a different article in that class. There are two divisions to be considered (*a*) the classes in sch. III of the Designs Rules, 1932, and (*b*) the division between articles of different types. It is inconceivable that because two articles are made of metal and so are within class I., a design which is quite unknown in the case of one of them should be prohibited in its application to it merely because it was known in the case of the other, however divergent those articles might be. In the present case the purpose of the collars in the design is (*a*) to make the appellants' fuse more easily recognizable and (*b*) to enable a vulcanizing machine to be made which would fit this type of fuse in such a way that this type of fuse would be the most suitable one to operate it. If one had a yale key made in the shape of one's initial, S., for example, and then took it to a locksmith to make

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a lock to fit it the design of the key would be registrable. The analogy to the present case is exact. This fuse is a safety measure designed to ensure that only a fuse of the right fusable alloy can be used in the machine. The respondents are free to make a fuse of a different shape and have a machine made for it. They would not infringe the appellants' monopoly unless they made an article of readily fusable metal for use in a vulcanizing apparatus in the same shape as the appellants' design. The word " design " is defined in s. 93 of the Act to mean " features of shape," etc. " applied to " an article and, therefore, the word " design " when used in the Act does not mean just " features of shape," etc., but " a particular kind of " article having a particular shape," etc. Accordingly, the words of s. 60, sub-s. 1 (*a*) (" apply . . . . to any article . . . . " the design ") mean " make an article of that particular kind " (as specified in the certificate of registration) and having that " particular shape," etc. Thus, registration gives a monopoly only in respect of articles of the particular kind specified in the certificate of registration and such registration neither covers, nor is invalidated by, the prior existence of articles of a different kind which may fortuitously be included in the same class, e.g., because they are also made of metal. The barrel shape is well known but one might want to register a design for barrel-shaped lampshades of glass, and this would be registered in class IV. A previous make of barrel-shaped lampshades in metal would invalidate the registration because the design as applied would not be new or original but if someone had previously made a barrel-shaped inkpot in glass that would not invalidate the registration because the application would be quite different. (See r. 17 of the Designs Rules and s. 50, sub-s. 1, of the Act.) One cannot divorce from the meaning of " design " the necessity that the features of shape shall be fitted to the article to which they are applied. It is not lawful for another to make the article specified in the shape specified in the certificate. In the case of a " set " of articles (defined in r. 2 of the Designs Rules), it is infringement to do this in the case of any article of the set. It is to cover the case of a set that the words " any " article " are used in s. 60,sub-s. 1 (*a*), for a thing may be in the legal sense a different design, though the same shape. In the present case here is a design for a specific article and no such article has been made in that shape, configuration or pattern before. There is no reported case of the registration of such a design having been held invalid for want of novelty. This contention is supported by *In re Clarke's Design* (1) and *Dover, Ld.* v. *Nürnberger Celluloidwaren Fabrik Gebrüder Wolff* (2). [They also referred to *Walker, Hunter & Co.* v. *Falkirk Iron Co.* (3); *Saunders* v. *Wiel* (4); *Le May* v. *Welch* (5); *Simmons* v. *Mathieson & Co., Ld.* (6); *Phillips* v. *Harbro Rubber Co.* (7) and *Kestos, Ld.* v. *Kempat, Ld.* (8).] Further, this design is not "a mere mechanical device." The word device does not mean an article or a thing; the nearest synonym is "arrangement" or "contrivance." Registration of a design covers the shape but not the principle which has determined the shape. Provided the design when applied to the article in question has definite features of shape, it is not "a mere mechanical device." Nothing, whatever functional part it may play as part of an article, is "a mere mechanical device" if its shape is not required for working all the articles of the type in which it is embodied. A particular shape of corrugated hairpin would be registrable, although the object of the corrugations was to prevent slipping but only that particular shape would be protected—not other and different corrugations attaining just the same end. A yale key may be cut in many different shapes, each opening a particular lock. Each would be registrable, at any rate, if the key was devised first and the corresponding lock devised for it afterwards. Only a design for a key of a shape which must be adopted in order to open any yale lock would not be registrable. "Design" does not include a mechanical principle but that does not mean that something which fulfils a mechanical function cannot be registered as a design. The fundamental test is whether the article has definite features of shape. In the case of a mere mechanical device those features are dictated by the function. But a fuse does not have to be made in any particular shape. The objects of the fuse in question are (*a*) to be of a shape which is easily recognizable; (*b*) to act as a fuse, and (*c*) to enable a machine to be devised which will work best with this shape of fuse, for it is fundamental that when this fuse was devised there was no machine which it had to fit; accordingly its shape was not dictated by functional considerations. If a machine had previously existed a design of fuse which would give a monopoly in it would not be registrable. But in commercial and profit-making importance the vulcanizing machine is of far less consequence than the fuse since it lasts indefinitely and the profit lies in supplying the fuses and the patches. There was no functional necessity for the shape of this fuse. The true meaning of the phrase " a mere mechanical device " is set out in Russell-Clarke on Copyright in Industrial Designs, pp. 15-16. [They referred to *Walker, Hunter & Co.* v. *Falkirk Iron Co.* (1); *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (2); *In re Wingate's Design* (3); *Pugh* v. *Riley Cycle Co., Ld.* (4); *Tecalemit, Ld.* v. *Ewarts, Ld.* (*No.* 2) (5); *Kestos, Ld.* v. *Kempat, Ld.* (6) and *Rose* v. *J. W. Pickavant & Co., Ld.* (7).]

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(1) [1896] 2 Ch. 38, 45; 13 R. P. C. 351, 359.

(2) [1910] 2 Ch. 25; 27 R. P. C. 498.

(3) (1887) 14 R. 1072; 4 R. P. C. 390.

(4) [1893] 1 Q. B. 420; 10 R. C. P. 29.

(5) (1884) 28 Ch. D. 24.

(6) (1911) 28 R. P. C. 486.

(7) (1920) 37 R. P. C. 233.

(8) (1935) 53 R. P. C. 139.

Lloyd Jacob K.C. and *P. Stuart Bevan* for the respondents. The alleged design is not registrable within the Patents and Designs Act and was wrongly registered and should be expunged from the register. The fundamental questions are: (*a*) What is a " design " and what matters are to be considered as " features of shape," etc., in the definition in s. 93? (*b*) What matters must be excluded because of the phrase " which . . . . " appeal to and are judged solely by the eye " in the definition? (*c*) What is the scope of the phrase " any mode or principle of " construction, or anything which is in substance a mere " mechanical device " in the definition? Design is an artistic conception with a notional existence independent of its application but which can only be monopolized in relation to its application to an article or articles. There is a distinction between a design and an article made from that design, between the shape of a thing and a thing of that shape. The Act of 1907 defines " design " and " article " separately. The definition of " design " in that Act is not substantially different from that contained in s. 60 of the Patents, Designs and Trade Marks Act, 1883. The current definition was substituted by s. 19 of the Act of 1919; this (inter alia) changed the phrase " applicable to any article " into " applied to any article." There is neither novelty nor originality in the alleged design. It is only when one travels beyond " features of shape " and the other matters provided for by the Act that one finds the germ of some novelty in this design. So far as looking at it goes it might be anything and made of any substance or metal,

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(1) (1887) 14 R. 1072; 4 R. P. C. 390.

(2) (1889) 14 App. Cas. 550; 6 R. P. C. 554.

(3) (1934) 52 R. P. C. 126.

(4) [1912] 1 Ch. 631; 29 R. P. C. 196.

(5) (1927) 44 R. P. C. 503.

(6) (1911) 28 R. P. C. 486.

(7) (1923) 40 R. P. C. 320.

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not necessarily of fusible alloy. The appellants cannot rely on making the article of a special metal or of a special size or on using it with a vulcanizing apparatus. They cannot affect the extent of the protection afforded by the Act by stating an alleged novel purpose. It is straining language to seek to found a distinction by alleging such a purpose. Under the Act the Board of Trade has divided all types of articles into classes and any design which has previously been applied to any article, whatever its type, in one of the classes is an anticipation of the same design applied to any other article in that class, however much the two articles may differ in type or object. The classes provide a field within which monopoly is granted. The purpose for which an article is used is nowhere referred to in the relevant sections. Purpose cannot be prayed in aid to establish a monopoly right. The matter must be decided by considering (*a*) the shape which the appellants propose to apply, and (*b*) the shape which others have applied. One does not re-design a thing by finding a new purpose for it. If this design were properly registered it would be infringed by any article of this shape made of metal. As to the phrase " appeal to and are judged solely by the " eye," that does not necessarily mean pleasing to the eye. The features of shape must appeal to the judgment of our pictorial sense in a way which blind men could not appreciate. The alleged design is in substance and in fact " a mere mechanical device." Any article the shape of which is required to perform a functional purpose is a mere mechanical device ; it is irrelevant that different shapes and devices could be adapted to perform a similar purpose, for in each case the shape is required for operational purposes and is determined by its function. A design for the business end of a key could not be registered (*a*) for want of novelty, and (*b*) because it is meant to subserve a purpose which makes it a mere mechanical device, the shape being chosen not to appeal to the eye but to work the machine. It is necessary that someone who wishes to perform a mechanical function should not be stopped by someone else who has a registered design. The definition of " mere mechanical " device " in *Kestos, Ld.* v. *Kempat, Ld.* (1) is accurate. Neither *In re Clarke's Design* (2) nor any of the authorities since the Act of 1919 contain anything contrary to the respondents' propositions ; they clearly support them. [They referred to *Moody* v. *Tree* (3) ; *In re Bayer's Design* (4) ; *Hecla Foundry*

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(1) 53 R. P. C. 139, 151.

(2) [1896] 2 Ch. 38 ; 13 R. P. C. 351.

(3) (1892) 9 R. P. C. 333.

(4) (1906) 24 R. P. C. 65.

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Co. v. *Walker, Hunter & Co.* (1) and the Copyright Act, 1911, s. 22.]

Shelley K.C. in reply. The respondents' argument is based on an incorrect reading of *In re Clarke's Design* (2). It is open to an applicant for registration to limit his design to a particular purpose and so to limit the scope of his monopoly. The position is exactly analogous to that of a patent. If at the date of registration of this design there had existed a similar metal cut-out or fuse for use in a domestic iron but not capable of being used in a vulcanizing machine, this would not have been within the field covered by the appellants' monopoly but it would have invalidated the registration on the ground of anticipation, since the two purposes are analogous. There cannot be said to have been any anticipation unless a previous article of readily fusible material of this shape, analogous to the appellants' article and adapted to a similar use, has already been published. A bicycle crank axle is not such an article. Further, there cannot be an infringement of the appellants' monopoly unless another person makes such an article. If the respondents contention were right registration in class 12 " goods not " included in other classes " would confer a monopoly in shape which would be startlingly wide. [He referred to *In re Clarke's Design* (3) ; *Le May* v. *Welch* (4) ; *Dover, Ld.* v. *Nürnberger Celluloidwaren Fabrik Gebrüden Wolff* (5) and *In re Gutta Percha and Rubber (London), Ld.'s Application* (6).] Further, this is not " a mere mechanical device." The fact that all the features of a design may have been chosen for the advantages which they produce is immaterial. The first person to think of a wedge shape to stop a window from rattling could have registered it, i.e., a wedge of a particular shape and particular proportions—not wedges in general. Further, the fuse in the present case could be constructed in a multitude of different shapes. If one read to a class of thirty students the specification of this vulcanizing machine and asked them to sketch a fuse conforming to it, all would be different. Accordingly this fuse cannot be " a mere mechanical device." [He referred to *Walker, Hunter & Co.* v. *Falkirk Iron Co.* (7).]

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(1) 14 App. Cas. 550, 554 ; 6 R. P. C. 554, 558.

(2) [1896] 2 Ch. 38 ; 13 R. P. C. 351.

(3) [1896] 2 Ch. 38, 45 ; 13 R. P. C. 351, 359.

(4) 28 Ch. D. 24, 35.

(5) [1910] 2 Ch. 25, 29 ; 27 R. P. C. 498, 504.

(6) (1935) 52 R. P. C. 383.

(7) 14 R. 1072, 1080, 1081 ; 4 R. P. C. 390, 393, 394.

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THE HOUSE took time for consideration.

July 2. VISCOUNT SIMON. My Lords, this is an appeal from an order of the Court of Appeal (Lord Greene M.R., du Parcq and Morton L.JJ.) which confirmed (though for different reasons) the judgment of Romer J. whereby he ordered the removal from the Register of Designs of the appellants' design No. 833097. The action was brought in the Chancery Division of the High Court by the present appellants against the respondents, claiming relief in respect of alleged infringement by the respondents of the appellants' copyright in this registered design. By their defence the respondents denied the infringement and further relied on the provisions of s. 54, sub-s. 1, of the Patents and Designs Act, 1907. They also alleged that the registration of the said design was invalid and counterclaimed for the rectification of the register accordingly. On the issues of infringement and on the defence raised under s. 54, sub-s. 1, the learned judge found as a fact that the sale by the respondents of articles alleged to infringe the appellants' copyright occurred in circumstances which would in any case disentitle the appellants to recover any penalty or damages, and he further held (*a*) that at the time of its registration the design was not a "new or original design not previously published in "the United Kingdom" within s. 49, sub-s. 1, of the Act and (*b*) that it was not a "design" at all within the meaning of the Act because it was so minute that its shape could not be adequately apprehended by ordinary human vision, unassisted by a magnifier. As to this second reason, it is enough to say that the drawings annexed to the certificate of registration No. 833097 do not include any indication of dimensions, nor do existing regulations so require, but that the drawings themselves measure several inches in length, while the actual object produced by the appellants as embodying the design, though very small, being about the length of an ordinary thumb nail, was not found by the Court of Appeal to be so tiny that its shape could not be apprehended by the eye. The Court of Appeal therefore did not agree with the view of the trial judge that the alleged design was not registrable because it was intended to be applied to an article of so small a size. This topic has not been the subject of argument before us. The question of how far, if at all, minuteness in the object to which a design is applied affects the registrability of the design must be regarded as reserved for decision if and when a future case raises the point. Before the Court of Appeal the appellants did not seek to challenge Romer J.'s decision that their action should be dismissed, but confined themselves to appealing against the order on the counterclaim directing that the Register of Designs should be rectified by removing from it design No. 833097. The learned judge's view that this order should be made because the design was not " new or original " was, of course, discussed on the appeal, but the ground on which the Court of Appeal decided to uphold the cancellation was a different one, raised in the pleadings but not dealt with by Romer J., viz., that the alleged design was not registrable because, as applied to the article specified in the certificate, it was something " which is in substance a mere mechanical " device," and thus was not included in the definition of " design " in s. 93 of the Act. Before this House both the ground taken by Romer J. and the ground taken by the Court of Appeal have been fully examined, and though a decision adverse to the appellants on one of these grounds would render it unnecessary to deal with the other, I think, in the circumstances, it would be of value if the House were to deal with both.

First, as to the contention that the design is not " new or " original." The definition in s. 93 (as amended by s. 19 of the Act of 1919) states that " design " means only " features of " shape, configuration, pattern, or ornament applied to any " article by any industrial process or means . . . . which in the " finished article appeal to and are judged solely by the eye." In the present case it is the " features of shape " which are relevant. The drawing attached to the certificate shows a cylindrical rod carrying at each of two places along its length a bevelled collar, which increases the diameter of the rod where it occurs by about a third. The two collars are similar to one another and are placed symmetrically from one or other end of the rod at a distance which is somewhat less than a third of the rod's length. The middle section of the rod is slightly thicker between the two collars than it is where it protrudes beyond either of them. The certificate of registration describes the design as " in class I " and as being " in respect of the appli- " cation of such design to a metal cut-out or fuse for use in a " vulcanizing apparatus." The statement that the design is applied to a metal cut-out or fuse satisfies the requirement of the statutory definition that " design " means the " features of shape " . . . . applied to any article." The additional statement that the article is "for use in a vulcanizing apparatus " is no part of the statutory requirements, but r. 17 of the Designs Rules (St. R. & O. 1932, No. 872) made under s. 86, sub-s. 1(*a*), of the Act purports to authorize the comptroller to require the applicants to state for what purpose the article to which the design is to be applied is used. In the present case, they did so voluntarily. Class I in the classification of goods contained in sch. III of the Designs Rules consists of "articles "composed wholly of metal or in which metal predominates, "and jewellery." There is thus a vast variety of objects included in the class, and inasmuch as the features of shape in the registered design are substantially the same as the features of shape in rollers in rolling mills or in a bicycle crank axle, both made of steel and thus in the same class, which were well known at an earlier date, the respondents contended at the trial that this was enough to prove that the appellants' design was not "new or original." If it be enough to disprove novelty or originality to show that any other article in class I, though used for quite a different purpose, was already known to be made according to a design with the same or substantially the same features of shape, then this is clearly proved in the present case and the appellants' claim to retain their design on the register fails on this ground. The appellants contend however that identity of shape previously applied to articles of quite a different type, though falling within the same class, is not enough to destroy the validity of their claim that the design they have registered is "new or original." Mr. Shelley seeks to limit the field within which it is relevant to ask whether a design as defined in the Act has been anticipated, to an area which is not so wide as that of the class, though I have found it difficult to grasp with precision what are, according to him, the metes and bounds of the relevant field within the class. His contention, as I understand, is that no previous application of the design to another article in class I should be regarded as an anticipation unless this previous article is "analogous" to the article mentioned in the certificate, and by analogous is meant made for a similar use or purpose. Similarly, the contention is that there is no infringement of the appellant's monopoly unless another person subsequently makes an article of readily fusible metal in the same shape adapted for the same use, viz., for use in a vulcanizing apparatus. In other words, the shape may have been already applied to other articles in the same class, but that is (according to Mr. Shelley's argument) no reason why registration should not be granted in respect of the novel application of the same shape to another and different article in that class.

In deciding whether this contention is correct, our first duty is to examine the language of the statute itself. By s. 53 the registration of a design gives copyright in it to the proprietor during five years from the date of registration. By s. 93 " copyright " means the exclusive right to apply a design to any article in any class in which the design is registered—in the present case in class I. Indeed, it is not obvious what is the purpose of providing for a classification of goods unless it be to indicate the area within which the monopoly would exist. I cannot construe the words " any article in any class " otherwise than as embracing all the articles in that class whatever may be the differences of use or purpose among them. If this is so, the bicycle crank axle must be an example of " any article " in class I and the copyright which would be given to the appellants by registering the design No. 833097 would include the exclusive right to apply their design to a bicycle crank axle. But this shape as applied to a bicycle crank axle has been used and published long before 1939, and it follows that the appellants' design is not " new or original." I am fully alive to the fact that this construction greatly cuts down the instances in which, on another view, a design may be validly registered. But the truth is that this particular design is of the most ordinary character: its general features of shape are to be found in numerous and well-known products of engineering. It has no significance whatever except in connexion with the use to which the object to which it is to be applied is to be put. The shaping of collars on metal bars and rods has long been practised for various purposes and is a matter of common knowledge. The only ground on which, as it seems to me, such a design could be regarded as " new or original " would be if it is legitimate to regard designs applied to articles in the same class as different from one another according to the use to which the article is put, or is intended to be put. But there is nothing in the definition of design in s. 93 (save in the final words of exclusion, which are not relevant on the issue of novelty but have to be considered on the second aspect of the case) which suggests that one design is to be distinguished from another by the feature of the use to which the article to which the design is applied is to be put. On the contrary, the definition states that the word means " only " the features of shape, etc. It seems to me, therefore, that, on the words of the statute, a design, in order to be entitled to copyright, must run the gauntlet of comparison with previous designs applied to all other articles in the same class. Mr. Shelley contends that the construction which I feel compelled to adopt is contrary to previous decisions, and in particular to the well-known judgment of Lindley L.J. in deciding the case of *In re Clarke's Design* (1). Even if it were so, the House would still be obliged to give a construction to the statute which it believes to be correct, but in fact Lindley L.J.'s judgment, when carefully examined, will be found not necessarily to be in conflict with the construction I have suggested. The question in that case arose under the Act of 1883, and the Lord Justice expressly mentions that among the sections to be considered was s. 50 of that Act, which contains a definition of copyright in terms which do not materially differ from the present definition. It is impossible to suppose that the Lord Justice did not keep in mind the statement that copyright was the exclusive right to apply the design to any article " in the class or classes in which the design is registered," but he chose to decide the case on the wider ground that even if the articles to be compared were in different classes (which they apparently were not), a design applied to an article in one class cannot be said to be " new or original " if it is already being applied to articles of an analogous character even though they are in another class. His references to *In re Bach's Design* (2) and to *In re Read and Greswell's Design* (3), make this perfectly plain. In the latter case Chitty J. said (4): " No doubt the copyright that is conferred by the Act of " Parliament . . . . is a copyright only in respect to the goods " comprised in the class in which the registration takes place " but he then went on to explain that a want of novelty or originality may exist if a design applied to an article in one class is merely imitated in the application of it to a similar article made in a different material in another class. The result of the decisions is in effect to establish that the claim of a design to novelty or originality may fail in either of two ways, (i.) because there is another article in the same class to which the shape has been already applied, or, (ii.) because the shape has already been applied to another article of an analogous character even though it is included in a different class. In both cases, of course, the earlier application must have been "published in the United Kingdom." When the two articles to be compared as embodying the same design are in the same class, a difference of purpose or use appears to me to be immaterial. If monopoly exists, it is monopoly in respect of features of shape and the like which appeal to and are judged solely by the eye, and this excludes the idea that monopoly is established by considering, within the same class, how far the use of one article differs from the use of another article with the same features of shape.

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(1) [1896] 2 Ch. 38, 41; 13 R. P. C. 351, 357.

(2) (1889) 42 Ch. D. 661; 6 R. P. C. 376.

(3) (1889) 42 Ch. D. 260; 6 R. P. C. 471.

(4) (1889) 6 R. P. C. 471, 474.

Secondly, as to the respondents' contention that the excluding words at the end of the definition of "design" apply, and that the appellants cannot have a monopoly because what is claimed is a thing "which is in substance a mere mechanical device," this is the ground on which the Court of Appeal ordered the removal from the register of design No. 833097. The definition concludes by stating that design "does not include any mode or "principle of construction, or anything which is in substance a "mere mechanical device." These words of exclusion first appeared in the Patents and Designs Act, 1919, s. 19, though it may be that they only express what was previously implied in the true conception of a design in the statute law relating to the subject. The meaning of the exclusion is fairly clear though it is not altogether easy to define with accuracy. Luxmoore J., as he then was, in *Kestos, Ld.* v. *Kempat, Ld.* (1) explained the relevant phrase thus: "A mere "mechanical device is a shape in which all the features are "dictated solely by the function or functions which the article "has to perform," and he cites in support of this view the decision of Romer J. (afterwards Lord Romer) in *Tecalemit, Ld.* v. *Ewarts, Ld.* (*No.* 2) (2). I think that Luxmoore J.'s words may be accepted as a useful and accurate test. The configuration of a key, for example, is what it is solely because it has to operate a lock with appropriate wards, and (apart altogether from want of novelty) would be a "mere mechanical "device" within this definition. It is to be noted that in the provisional specification No. 522543 of 1938, respecting the patent for a vulcanizing machine using a fusible member of another pattern the statement is made that "the correct fuse "will therefore constitute a kind of key for operating the switch "mechanism, which cannot be operated by an incorrect key." The first meaning of "mechanical" in the Oxford English

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(1) (1935) 53 R. P. C. 139, 151. (2) (1927) 44 R. P. C. 503, 507.

Dictionary is " concerned with the contrivance and construction " of machines or mechanism," and a device which is in substance a mere mechanical device in this sense seems to me to be what is excluded by the words of the Act. Morton L.J. in the Court of Appeal in the present case (1) reached the conclusion that the plaintiffs' design is " a shape in which all the features " are dictated solely by the function which is to be performed " by the article to which the shape is applied," and that " that " shape possesses no features beyond those necessary to enable " the article to fulfil its function." I have come to the same conclusion. If one looks at the drawing annexed to the patent specification No. 533816 of 1939, which relates to improvements in vulcanizing machines for repairing motor vehicle tyres, one sees depicted in figure 5 exactly the same two-collared rod as is shown in registered design No. 833097, and the reason for so shaping it is plainly due to the function which it is to perform, namely, to fit into the correspondingly shaped orifice of the machine, and so to find its way into the position where it will constitute a fusible element. Indeed, the specification itself describes one advantage of the mechanism which it is sought to cover by the patent as lying in the fact " that the circuit can " only be closed with the aid of the fusible element and only " fusible elements of the pre-determined correct shape." It further describes the insertion slot as one which " corresponds in " profile with the shape of the fuse member." In fact the shape of the article has no significance other than this, that if it has the features indicated it will function in the machine. Mr. Shelley addressed to us an ingenious and detailed argument designed to show that the features of shape applied to the article in question were decided upon first and the machine in connexion with which it was to be used came into existence afterwards, but it is plain that one was conceived of in connexion with the other, and I cannot think that this case should be determined by inquiring whether the particular vulcanizing machine which would take through its orifice an article of this shape was already made at the date of the registration of the design, or existed only in Mr. Steiner's mind, or was already in at least an experimental condition. In any case, I agree with Morton L.J. that, on a close examination of Mr. Steiner's evidence, there is nothing in his replies to negative the existence, at the time when the application to register the design was made, of an experimental machine which was intended to be worked by fuses made according to the registered design.

(1) (1945) 63 R. P. C. 81, 91.

For both the above reasons, therefore, I am of opinion that the appeal fails and should be dismissed with costs.

My Lords, I am authorized by my noble and learned friend LORD MACMILLAN to say that he concurs in this opinion.

LORD PORTER. My Lords, the only issue left for your Lordships' decision in this case is to be found in the counterclaim in which the respondents claimed rectification of the register of designs by the removal therefrom of the appellants' design. The respondents attack the validity of the registration for two reasons (1.) that it has been anticipated, and (2.) that it is a mere mechanical device and as such not the subject of registration. Upon the first question the respondents say that by the terms of the Act the Board of Trade are given power to divide all types of articles into classes, that they have done so, and that any design which has been anticipated in any article, whatever its type, in one of the classes is an anticipation of any design in any other article in that class however much the two articles may differ in type or object. The appellants on their part say that there is a cross division. One division is into the classes which the Board of Trade have prescribed, the other is that between articles of different types, e.g., a coal-scuttle and a bicycle frame may both be made of metal and therefore within class I, but a design registered or to be registered in respect of one is not necessarily anticipated by a similar design in respect of the other because the types of the two articles differ one from the other. The determination of the question which of these two views is right depends and must depend on the provisions of the Act itself and of any rules made thereunder. Those provisions are to be found in the Patents and Designs Acts, 1907–1942, part II " Designs " beginning at s. 49. The more important of those provisions are contained in s. 49, sub-ss. 1 and 2, s. 53, sub-s. 1, s. 60, sub-s. 1 (*a*), s. 86, sub-ss. 1 (*b*) and 2, and finally, the definition " Copyright." They are as follows:

" *Registration of Designs.*

" 49. (1.) The comptroller may, on the application made " in the prescribed form and manner of any person claiming " to be the proprietor of any new or original design not " previously published in the United Kingdom, register the " design under this part of this Act. (2.) The same design " may be registered in more than one class, and, in case of

" doubt as to the class in which a design ought to be registered " the comptroller may decide the question."

" *Copyright in registered Designs.*

" 53. (1.) When a design is registered, the registered " proprietor of the design shall, subject to the provisions of " this Act, have copyright in the design during five years " from the date of registration."

" *Legal Proceedings.*

" 60. (1.) During the existence of copyright in any design " it shall not be lawful for any person—(*a*) For the purposes " of sale to apply or cause to be applied to any article in any " class of goods in which the design is registered the design " or any fraudulent or obvious imitation thereof, except with " the licence or written consent of the registered proprietor, " or to do anything with a view to enable the design to be so " applied."

" *Powers, &c., of Board of Trade.*

" 86. (1.) The Board of Trade may make such general " rules and do such things as they think expedient, subject " to the provisions of this Act . . . . (*b*) For classifying " goods for the purposes of designs . . . . (2.) General " rules shall whilst in force be of the same effect as if they " were contained in this Act."

" *Definitions.*

" 93. In this Act, unless the context otherwise requires . . . " ' Design ' means only the features of shape, configuration, " pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or " chemical, separate or combined, which in the finished article " appeal to and are judged solely by the eye ; but does not " include any mode or principle of construction, or anything " which is in substance a mere mechanical device : ' Article ' " means (as respects designs) any article of manufacture and " any substance artificial or natural, or partly artificial and " partly natural : ' Copyright ' means the exclusive right to " apply a design to any article in any class in which the " design is registered."

The rules on their part contain a classification of goods drawn in the widest terms by the Board of Trade. In these sections and, indeed, in the Act and the rules generally it is notable that, throughout, the differentiation of class from class is insisted upon but, in terms at any rate, no distinction is drawn between different types of article. In particular this is manifest in the definition of " copyright " in s. 93 as " the exclusive right to " apply a design to any article in any class in which the design " is registered " by which the proprietor of the design appears to be protected against any user of his design in respect of any article in the same class however widely that type of article may differ from others in that class. This reading of the definition is, I think, borne out by the provisions of s. 60, sub-s. 1, making it unlawful to apply the design to any article in any class of goods in which the design is registered. I should myself have thought that this language in clear terms protected the copyright in the registered design against the use of that design in respect of any article in the same class, however varied the type of the different articles in that class might be. But, it was said in answer, that no such view has ever been taken, that it is inconceivable that because two articles were made of metal a design which was quite unknown in one should be prohibited in any other, however divergent their types might be and, finally, that what was prohibited was the use of a design, i.e., a shape applied to any article ; that use of the shape itself was not forbidden except when applied to an article and that must mean applied to an article of the same type. My Lords I find great difficulty in apprehending exactly why " features " of shape applied to any article " should be confined to articles of the same type even if one is to break off the definition of design at the word " article " and not continue to the end of the definition. That definition seems to me to be drawn without reference to type of article or even to distinction of class. It seems merely to insist upon two things (1.) that the design must be used for an industrial process and (2.) that it must not include any mode or principle of construction or be a mere mechanical device. This reading moreover is borne out if one reads the definition in full and appreciates why the words " applied to any article by any industrial process," etc., are inserted. Their object, as I see it, is solely to ensure that registration is confined to an industrial article and not used to protect (say) reproductions of pictures or artistic designs to which no industrial reproduction is to be applied. Roughly, I think, that for this purpose one might read the definition of copyright as meaning the exclusive right to apply an industrial

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design (i.e., a design devised for reproduction by an industrial process) to any article in any class in which the design is registered. I recognize at once that such a construction of the Act prevents the acquisition of copyright in a design by any person ingenious enough to adapt a design used with or without his knowledge in one type of article to another type of article in the same class thogh they may be widely different in origin, use and appearance. One answer in my view is that the wording of the Act combined with the power given to the Board of Trade to classify goods for the purposes of designs brings about this result. But I think there is also another answer. Primarily the object of the Act is to protect what one may call artistic decoration, though the artistry may be bad and the decoration common-place or worse, and I should agree with Mr. Russell-Clarke when he says in the preface to his book on Copyright in Industrial Designs, p. v. : "Though a design need not be "artistic, this form of protection is meant to cover cases where "the object is to please the eye." Design in the other sense is ruled out by the exclusion of any mode or principle of construction, i.e., it must be adapted to the shape, pattern or ornament of the article not to its use and from this point of view features of shape in one article do not differ so much one from another as they would if they were devised to some constructional end. This consideration, however, is only a minor matter, since an adaption of the same design from one class to another may still be protected as it was in *Walker Hunter & Co.* v. *Falkirk Iron Co.* (1) and in *Saunders* v. *Wiel* (2), and, indeed, this approach to the subject is more germane to the question of what is and what is not a mechanical device. I am content to say that the wording of the Act is unambiguous and therefore any argument based upon an alleged inconvenience of adopting the construction it plainly bears is ruled out. It is asserted, however, that such a view is inconsistent with the decision of and reasons given by Lindley L.J. in *In re Clarke's Design* (3). The decision itself does not appear to give rise to any difficulty : it determines no more than that a design in a particular class may be anticipated by a similar design adapted for use in an article of the same type even though it be in a different class, but the expressions used do, I think, give rise to some difficulty. It is true that the wording of the Act of 1883 under which that decision was given differs somewhat from the phraseology used in the Act of 1907 which it falls to your Lordships to construe. But in substance I think their meaning is the same, and, therefore, it is necessary to consider Lindley L.J.'s reasoning (1). After saying that in *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (2): "A design for the shape of an iron furnace-door was "protected, although wooden doors of the same shape for "sideboards and other articles of furniture were old. The "things shaped were for such different purposes and their uses "were so dissimilar that the design for one of such things was "held to be new or original, although it was old for the other," he asks the question "What then is the test to be applied to a "case such as that before us ?" and answers "The design must "be new or original with reference to the kind of article for "which it is registered, meaning by kind of article, not the class "of article mentioned in the schedule to the rules but the kind "of article having regard to its general character and use. "A design may be new for a coal-scuttle, but not for a bonnet." In terms this language in no way affects the construction of the Act which has been suggested above. It merely decides that a design though registered or used in one class of articles may still be an anticipation if applied to a similar type of article in another class. It does not say that a design registered in a particular class does not protect its application to any article in that class. But, as was pointed out, the articles in question were almost certainly both in class I, and, therefore, it would have been an answer to the claim that the design has been anticipated in that class, yet no such argument was presented. The answer is, I think, that what was being argued was that the design was new, whether in class I or in any other class, and Lindley L.J. was considering this aspect of the case and this only. He was not deciding that a design protected a type of article only: he was deciding that an anticipation of the design in a similar article in another class might yet be a ground for refusing or expunging registration.

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(1) 14 R. 1072 ; 4 R. P. C. 390.

(2) [1893] 1 Q. B. 470 ; 10 R. P. C. 351, 357.

(3) [1896] 2 Ch. 38, 41 ; 13 R. P. C. 29.

This view would of itself determine the case, but the question what is the meaning of "a mere mechanical device" has been fully argued before your Lordships and it is proper that a decision upon it should be given. For the appellants it was argued that nothing, whatever functional part it might play as part of an article, was a mere mechanical device if its shape was not required for working all articles of the type in which it was embodied. A yale key, it was said, might be cut in all sorts of shapes each of which would open a different yale lock and each different shape would be a registrable design though it was devised for use with a particular type of lock only, at any rate, if the shape of the key was first devised and the lock, upon which it was to operate, was thought out and constructed later. The only non-registrable design would be a key of a shape which must be adopted in order to open any yale lock. The respondents on the other hand maintained that any article the shape of which was required to perform a functional purpose was a mere mechanical device: it did not matter that different shapes and different devices could be adopted to perform a similar purpose—in each case the shape is required for operational purposes: its ward shape is determined by its function. I do not know that the question is capable of much argument. In the present case the fuse is constructed in the shape shown in order that it may be used in connexion with a particular type of vulcanizing machine, and for this purpose, I do not think it matters whether the machine was devised to fit the fuse or the fuse to fit the machine. No doubt another shape of fuse and another type of machine could be invented to perform the same task. However that may be the only object of using the registered shape now under discussion is to perform the functional purpose of making the machine work. Such a design is to my mind a mechanical device because it has in view the object of successfully performing a mechanical act. It is a mere mechanical device because substantially that is its only object. No doubt it is easily recognizable, must be capable of acting as a fuse, and, if that view of the facts be accepted, was conceived before the machine into which it was to be fitted was invented. A device, as it appears to me, is none the less mechanical whether the mechanism with which it is to be used is devised before or after the device. As to the two earlier reasons they appear not to make the design less mechanical, but only to make its mechanism more ingenious and more successful. Primarily the object of the Act is to protect shape, not function, and not to protect functional shape. I agree that the appeal should be dismissed.

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(1) [1896] 2 Ch. 38, 45; 13 R. P. C. 351, 359.

(2) 14 App. Cas. 550; 6 R. P. C. 554.

LORD SIMONDS. My Lords, the question raised in this appeal is whether a design which was numbered 833097 and registered as of January 25, 1939, under the Patents and Designs Acts,

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1907–1942 is valid. By Romer J. and the Court of Appeal it has for different reasons been held to be invalid. The certificate issued in respect of the design certified that it had been registered "in respect of the application of such design to a metal "cut-out or fuse for use in a vulcanizing apparatus." A copy of the design annexed to the certificate and the drawings therein contained were accurately thus described by Romer J. (1): "The drawings annexed to the design show in perspective "view, profile view and end view a circular bar or rod. The "centre part of the rod is somewhat thicker than the two end "parts and is divided or separated therefrom by bevelled collars. "The central portion of the rod is slightly longer than the top "end parts. The design as shown in the drawings, possesses a "definite appearance, but as no scale is shown, no idea is "afforded of the size of the object drawn other than what can "be gathered from the verbal description of the application of "the design which is contained in the certificate. In fact the fuse "to which the design is applied is a minute object, its length "being little more than half of that of the average thumbnail." The respondents challenged and challenge the validity of the registration on three grounds: (*a*) that the design does not contain any feature applied to an article by any industrial process or means which in the finished article appeals to or is judged solely by the eye; (*b*) that, if it does contain any such feature, that feature is a mode or principle of construction or, alternatively, is in substance a mere mechanical device; (*c*) that the design was neither new nor original at the date thereof. Romer J. held the registration invalid upon the first and third grounds, the Court of Appeal upon the second ground.

I think it convenient to call attention to the statutory provisions which now prescribe the limits within which a monopoly of design can be claimed. The main Act is the Patents and Designs Act, 1907, which repealed previous enactments upon this subject, but this Act has itself been from time to time amended and, when in this opinion I refer to "the Act," I mean that Act as amended up to February 26, 1942. I must first refer to certain definitions which are of paramount importance. Section 93 of the Act enacts (inter alia) as follows:

> "'Design' means only the features of shape, configuration, "pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or "chemical, separate or combined, which in the finished

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(1) 63 R. P. C. 81, 84.

"article appeal to and are judged solely by the eye; but does "not include any mode or principle of construction, or "anything which is in substance a mere mechanical device; "'Article' means (as respects designs) any article of manufacture and any substance artificial or natural, or partly "artificial and partly natural; 'Copyright' means the "exclusive right to apply a design to any article in any class "in which the design is registered."

I turn back to the substantive enactment of the Act bearing in mind that its purpose is to create and define monopoly in design and that prima facie the ambit of the monopoly is by the definition of copyright to be found in the class in which the design is registered. Section 49 of the Act enacts by sub-s. 1 that the comptroller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under that part of the Act. The key words in this sub-section are "new or original." I do not venture an opinion what is the distinction between those alternatives. Sub-section 2 of the same section provides that the same design may be registered in more than one class and in case of doubt as to the class in which a design ought to be registered the comptroller may decide the question. I pause to observe that it is the "class" which is of importance. And this is emphasized by s. 50 which provides for the registration in certain cases of old designs in new classes. Thus, by sub-s. 1 it is provided that, where a design has been registered in one or more classes, the application of the proprietor of the design (but of no other person) to register it in another class is not to be refused nor the registration invalidated (*a*) on the ground of the design not being a new or original design, by reason only that it was so previously registered, or (*b*) on the ground of the design having been previously published in the United Kingdom, by reason only that it has been applied to goods of any class in which it was so previously registered. And by sub-s. 2 it is provided that "where the proprietor of a registered design applies for the "registration in the same class of goods of a design consisting of "the registered design with modifications or variations not "sufficient to alter the character or substantially to affect the "identity thereof, the application shall not be refused nor shall "the registration of that other design be invalidated" for reasons comparable to those referred to in sub-s. 1. Sections 51 and 52 provide for the grant of certificates of registration and

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for the keeping of a register of designs. Section 53 provides for the term of copyright. I can pass over ss. 54, 55 and 56 but note that in s. 57 provision is made for information being given by the comptroller whether registration still exists in respect of a design and, if so, in respect of what classes of goods. I come to a very important section, s. 60, which is headed "Legal Proceedings." It is important because, if there is any ambiguity as to the nature and extent of the monopoly conferred by the Act, i.e., as to what is intended by saying that the registered proprietor of a design shall have copyright in the design, it cannot fail to be useful to see in respect of what acts he may take proceedings to protect his monopoly. Section 60, sub-s. 1, enacts that during the existence of copyright in any design it shall not be lawful for any person (I put it shortly) (*a*) for the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof except as therein mentioned or (*b*) knowing that the design or any such imitation thereof has been so applied to publish or expose for sale that article. Sub-section 2 of the same section prescribes the relief recoverable by the proprietor of the design. Once more the reference to "class" is significant. The proprietor of a design registered in any class has the right to prevent its application to any article in that class. It will be observed that while the reference to classes is frequent, the Act does not itself define that expression or provide what the classes shall be. This is left to be dealt with by rules. For s. 86, sub-s. 1, provides that the Board of Trade may make such general rules and do such things as they think expedient, subject to the provisions of the Act, (*a*) for regulating the practice of registration under the Act, and (*b*) for classifying goods for the purposes of designs. In exercise of this power the Board of Trade have from time to time made rules, those now in force being the Designs Rules, 1932, as amended in 1938, to which I have already referred. I need refer only to r. 2 sub-r. 1,, which defines "set" as meaning a number of articles of the same general character ordinarily on sale together or intended to be used together all bearing the same design with or without modifications or variations not sufficient to alter the character or substantially to affect the identity thereof, to r. 6 which provides that for the purposes of the registration of designs and of those rules, goods are classified in the manner set out in sch. III thereto, and that if any doubt arises as to the class to which any particular description of goods belongs, it shall be determined by the comptroller, to r. 16 which provides that an application shall state the class in which the design is to be registered, and that, where it is desired to register the same design in more than one class, a separate application shall be made in respect of each class, and to r. 17 which provides that every application shall state the article or articles to which the design is to be applied and that, where the comptroller so requires, the applicant shall further state for what purpose the article, to which the design is to be applied, is used and the material or predominating material of which the article is made. The classification of goods in sch. III contains fifteen classes and is largely based on differences of material. Thus class I, with which this case is concerned, is " Articles composed " wholly of metal or in which metal predominates, and " jewellery," class II is " Books and book-binding of all " materials," classes III, IV, V and VI all commence with the words " Articles composed wholly of " and then different materials are stated.

I can now state in a few words what is the problem raised by the third ground of challenge by the respondents, which I find it convenient to take first, i.e., that the design was neither new nor original. While it was not contended that the design in question had previously been applied to a fuse, as I will without prejudice call the appellant's article, it was alleged and, as I think, clearly established by the evidence that it was common in mechanical engineering practice to provide collars upon bars or rods of metal such as rollers used in rolling mills, or shafts for gear boxes or bicycle cranks, all of them metal articles falling within class I. In particular, a bicycle crank was exhibited at the trial and your Lordships have had the advantage of seeing a full scale drawing of it, which left it beyond doubt that the features of shape and configuration which distinguish the design applied to the appellant's fuse had been anticipated in other metal articles. This being so, it would appear to me to follow that the appellant's design was not new or original and that the registration of it was invalid. The appellants seek to avoid this conclusion by a contention which I state as nearly as I can in the language of their formal case. Design, they say, is defined to mean " features of shape," etc. " applied to " an article and therefore the word " design " when used in the Act does not mean " features of shape," etc. but " a particular kind of " article having a particular shape," etc., and that, accordingly, the words of s. 60, sub-s. 1 (*a*), " apply . . . . to any article " . . . . the design " mean " make an article of that particular " kind (as specified in the certificate of registration) and having " that particular shape," etc. Accordingly, the argument proceeds, registration gives a monopoly only in respect of articles of the particular kind specified in the certificate of registration and such registration neither covers, nor is invalidated by the prior existence of, articles of a different kind which may be fortuitously included in the same class, e.g., because they are also made of metal. It was sought to justify this interpretation of the Act by reference to judicial authority. That I will presently examine. But since the monopoly is purely a statutory creation, I must first ask what support the appellant's contention finds in the language of the statute. The question that at once occurs to me to ask is, why, if the monopoly is defined by reference to classes of goods, a matter upon which the definition of " copyright " and the provisions of s. 60 are conclusive, some other area of monopoly, which is nowhere to be found in the Act, is to be substituted. It will be observed that in the language of their formal case which I have cited, the monopoly is alleged to be limited to articles " of the " particular kind," presumably in whatever class they may fall. In the argument before the House other language was used : the monopoly was limited to " similar " articles or to articles " in the same field " or " of the same type " or " of a similar " type." All these expressions have two things in common the first that they are not to be found in the Act of Parliament, and the second, that they are of a vagueness which I should be unwilling to ascribe to the legislature in the creation of a monopolistic right. But, my Lords, the further question arises : why, if the area of monopoly is not defined by class but by something else, it is necessary to have any classification at all ? To this question no satisfactory answer was given. It must, I think, be difficult in this field to reconcile the reward to be given to an inventor of design with industrial freedom. The solution found by the legislature was to give to the Board of Trade the power to make a classification of goods and to control the monopoly by reference to that classification. The Board might have exercised their power by defining classes in the language used by the appellants. Fortunately, as I think, they did not. The classification, which they have in fact adopted, may be considered somewhat arbitrary, e.g., by including all articles composed of metal and jewellery in one class. But so, I think, any classification was bound to be. If from the point of view of industry and manufacture it is unsatisfactory and is capable of improvement, new rules can be made and a new classification substituted. However this may be, I think that upon the plain, unambiguous language of the Act a design applied to any article in class I, if validly registered, gives a monopoly for that design in respect of any other article in that class, and as a necessary corollary of that, a design is not new or original and cannot be validly registered in respect of any article in class I if it has already been applied, whether registered or not, to any article in that class.

I have, as I have already said, been unable to find any ambiguity in the language of the Act. In particular the definition of " copyright " leaves no room for doubt. It was suggested that assistance might be got from the fact that articles, to which a design has been applied, are sometimes to be found in sets. For that reason I referred to the definition of " set " in the rules. I have not been able to follow this argument, which does not appear to have been considered in the courts below and there, with all deference to learned counsel, I must leave it. But, my Lords, counsel for the appellants relied on authority, and particular reliance was placed on what was said by Lindley L.J. in *In re Clarke's Design* (1). I think that this case has been mis-read and that Romer J. himself fell into error in thinking that he was precluded by it or by any other case from holding that (2) " any metal object (whatever its " purpose) designed to a particular shape is necessarily an " anticipation of any other metal object (whatever its purpose) " created subsequently in the same shape so as to deprive the " latter object of any claim to novelty." Your Lordships' attention has not been called to any case (except a case before the Patent Appeal Tribunal) in which it has been expressly decided that a design was registrable within a certain class notwithstanding that it had already been published in respect of another article within the same class, nor to any case in which the contrary had been expressly decided. The respondents urged that every decision proceeded upon the basis that the Act and its predecessors were absolutely clear in the sense which I have already put before your Lordships : the appellants countered by saying that the opposite view was implicit in the decisions of the court in such cases as *In re Clarke's Design* (3).

(1) [1896] 2 Ch. 38, 45; 13 R. P. C. 351, 359.

(2) 63 R. P. C. 81, 96.

(3) [1896] 2 Ch. 38 ; 13 R. P. C. 351.

My Lords, I find nothing in the decision of *In re Clarke's Design* (1) which in any way justifies the appellants' contention. The question here was whether a design which had been registered in class I for a "Lamp for electric lighting, "applicable for its shape" was valid. It was challenged on the ground that the design was not new or original in that it was substantially in the old form of lampshade which had been commonly used for gas lights and this challenge was upheld. From beginning to end of the case I find no reference to what I assume to have been the fact, that the registered design had been previously published in respect of an article falling within the same class I. The single question was whether there were such differences between the registered and earlier designs that novelty or originality could be claimed for the registered design. In the view of the Court of Appeal it could not, but in the course of his judgment Lindley L.J. made certain observations upon which the appellants rely (2). That learned lord justice, after an examination of the Act then in force, viz., the Act of 1883 as amended by the Act of 1888, made a reference which I think is instructive to *In re Bach's Design* (3). In that case, as he pointed out, a lampshade in the shape of a rose and made in linen was registered for goods in class XII and it was held that a lampshade of the same shape but made in china which had been registered for goods in class XIV. was not entitled to protection. Here was a clear decision approved by Lindley L.J. that, where a design has already been published in respect of goods in one class, novelty cannot be claimed for the same design in respect of the same goods merely because they are made of a different material and fall within another class. To the same effect was *In re Read and Greswell's Design* (4). But though the learned lord justice thus thought fit to expound the law in relation to novelty, though, indeed, it may be said that, if the construction of the Act which I have suggested to your Lordships is right, he might easily have disposed of the case by saying that the design could not be novel since it had already been registered in the same class, yet I cannot read his words as rejecting that construction and substituting for the monopoly limited by class a monopoly limited by the nature of the article. I cannot doubt that, if that had been his intention,

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(1) [1896] 2 Ch. 38; 13 R. P. C. 351.

(2) [1896] 2 Ch. 38, 41; 13 R. P. C. 351, 359.

(3) 42 Ch. D. 661; 6 R. P. C. 376.

(4) 42 Ch. D. 260; 6 R. P. C 471.

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he would have explained by what process of reasoning he arrived at an interpretation which appears to find no support in the plain language of the statute. I would not throw any doubt upon his decision that a design may not be novel though it has not been published in the same class, but I would hold, and I do not think he meant to decide the contrary, that it cannot be novel, if it has been published in the same class. Any observations to the contrary cannot, in my opinion, be regarded as good law and the decision of Luxmoore J. in *In re Gutta Percha and Rubber (London), Ld.'s Application* (1), sitting as judge of the Patent Appeal Tribunal, cannot be supported. Thus, my Lords, I agree with the conclusion reached by Romer J. on this part of the case, though I reach it by a somewhat different road.

Upon the first ground of challenge, which I understand to be based on the contention that the design as applied to the article in question is on so small a scale as to make no appeal to the naked eye (a contention which also found favour with Romer J.) I do not think it necessary to express any views. I am not satisfied that upon the facts such an issue arises. For the shape or configuration of the appellants' fuse appeared at least to my eye to have very definite characteristics which I recognized as having been anticipated by the earlier published designs. In the circumstances I will reserve my opinion upon what my be a difficult question of law, whether the eye, to which alone appeal must be made, is the natural eye unaided by a magnifier. Upon the second ground, with which your Lordships have dealt, I will content myself with saying that I fully concur in the reasoning and conclusion of Morton L.J.

LORD UTHWATT. My Lords three objections were taken to the appellants' design—first that it is not new or original, second that it is in substance a mere mechanical device, and third that the article in respect of which the design was registered was so minute that the design applied to it did not make an appeal to the eye.

The first objection, upon the facts proved, raises the question whether the existence of a design old as applied to some one article falling within a particular statutory class, necessarily precludes the attribution, for the purposes of the Act, of novelty or originality to that design when newly applied to any other article in the same statutory class, however different the two articles may be in nature and purpose. The matter in issue is not novelty or originality as a general conception, but novelty or originality for the purposes of the Act. A consideration of the relevant provisions of the Act may impose on the words " new or original " occurring in the phrase " a new or original " design," as used in the Act a limitation not suggested by the words themselves. The scheme of the Act is that goods are to be classified for the purposes of design in accordance with rules made by the Board of Trade (s. 86) and that a new or original design submitted by an applicant and accepted for registration is to be registered in some one class and may be registered in more classes than one, the appropriate class or classes being determined by the nature of the article in respect of which the design is submitted by the applicant. No registration other than registration in a class is permissible. The effect of registration is that the registered proprietor obtains for a period of years copyright in the design. Copyright is defined in s. 93 as " the exclusive right to apply a design to any article in any " class in which the design is registered." Section 60 (dealing with piracy of a registered design) provides that during the existence of copyright in any design it shall not be lawful " to " apply or cause to be applied to any article in any class of goods " in which the design is registered the design or any fraudulent " or obvious imitation thereof, except with the licence or " written consent of the registered proprietor." Unauthorized application of a registered design may be restrained by injunction.

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(1) 52 R. P. C. 383.

Those are the relevant provisions. It is obvious that the Act cannot be construed so as to permit of there being two or more competing designs registrable in the same class if each such design carries a monopoly as respects the application of the design to all articles falling within that class. That is an impossible position. The fact that only a new or original design may be registered, the circumstance that a design must be registered in a class and the terms of the definition of copyright and of the provision as to piracy leave but two ways of escape from it. Either (1.) novelty and originality for the purposes of the Act must be denied to a design proposed to be registered in a particular statutory class, when it is old in its application to any article falling within that class, or (2.) the monopoly conferred by a registered design must be limited by reference to the particular article to which on registration the design is applied. The point at issue therefore may be approached by considering whether the definition of copyright and the provision as to piracy when fairly read enable the monopoly to be so limited. In my opinion they do not.

The appellants sought to secure that limitation by putting a particular construction on the definition of design contained in the Act. Design is defined in s. 93 as meaning "only the "features of shape, configuration, pattern, or ornament "applied to any article by any industrial . . . . means . . . . "which in the finished article appeal to and are judged solely "by the eye . . . ." In the appellants' submission, design means not the features of shape appearing in an article but a particular kind of article having a particular shape. The article referred to in a design when registered accordingly entered into and formed part of the registered design. In my view that is not the true construction of the definition. Its whole point is the isolation of the specified features. The use of the word "applied" in the definition is dictated by the reference to the means of application and is not directed to the inclusion in the design of the article featuring the design. But, even if one accepts the appellants' construction of the word "design," the phrase "any article in any class of goods in which the "design is registered" appearing in the definition of copyright and the provision as to piracy, is not susceptible of a meaning which excludes any article that is in the class. All indeed that results from considering the appellants' construction of the word design in connexion with the definition of copyright and the provision as to piracy is that an additional argument is furnished for rejecting that construction. The monopoly conferred by a registered design therefore, in my view, extends to all articles in the class in which the design is registered and it follows that a design is not new or original for the purposes of registration in any class if it is old in its application to any article in that class. Judged by that test the design of the appellants was not new or original for the purposes of class I. in which it was registered.

The appellants placed much reliance on the judgment of Lindley L.J. in *In re Clarke's Design* (1). That judgment when read as a whole does not afford any solid basis for their contention. Lindley L.J. dealt only with the question which arises when a design, old as regards an article falling within one of the statutory classes, was sought to be registered as

(1) [1896] 2 Ch. 38, 45; 13 R. P. C. 351, 359.

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respects an article falling within some other statutory class. Some novelty or originality had to be shown in the new application. That novelty might be found if the old design was applied to a different kind of article. Registration of the design in some other class or, without registration, use of the design as regards any article in that other class, would not, therefore, of itself deny novelty or originality to the design in its new application. Lindley L.J. did not at any stage concern himself with discussing the question whether prior use of a design as regards any article falling within a particular statutory class permitted novelty or originality being attributed to that design when applied to any other article in the same statutory class but it would appear that he thought the answer obvious. I quote the relevant passage (1): " From the wording " of ss. 47, 50 and 60 " (which correspond in substance with the relevant sections here, ss. 49, 60 and 93 of the Act of 1907 as amended), " it might be thought that if a design had never been " applied to articles comprised in one of the classes of goods " into which manufactured articles are divided for the purposes " of the Act, such design might be protected for that class even " if it had been previously applied to goods of a different class." The suggestion is that novelty in the application of the design to any article falling within the particular statutory class at any rate was necessary.

Upon the second objection I respectfully agree with the observations of the noble and learned Lord on the woolsack and my noble and learned friend Lord Porter. With them and the Court of Appeal I see no reason for excluding from the facts proper to be taken into account the knowledge of the designer as to the objects which the design is fitted to serve. His own intentions of the use to which the design is to be put—and here I differ from some expressions appearing in the judgment of the Court of Appeal (2)—are, taken alone, irrelevant, but those intentions may throw considerable light on the substantive nature of the features appearing in the device represented in the design. The design may give working effect to them. In the present case the designer's intentions throw a flood of light on those features. Every feature in the design was apt to serve a mechanical object and no feature had any other substantial quality. In the sum of the qualities of the design there was a mechanical device and nothing else.

(1) [1896] 2 Ch. 38, 44; 13 R. P. C. 351, 358.

(2) 63 R. P. C. 81, 88.

As regards the third objection—which was not argued before this House—I observe only that the design as registered depicts merely the relative sizes of its various features and not the actual size of any one of them, and that in the design as used the characteristic features are readily discernible to the naked eye. This objection did not arise on the facts and it is unnecessary to express any opinion on the question of construction raised by it.

I would dismiss the appeal.

Solicitors for appellants: *Warren & Warren.*

Solicitors for respondents: *Stocken, May, Sykes & Dearman, for Baldwin, Weeks & Baldwin, Clitheroe.*

Distinguished. HARVEY v. ROAD HAULAGE EXECUTIVE [1952] 1 K.B. 120

Applied. GRANT v. SUN SHIPPING CO., LTD. [1948] 2 All E.R. 238.

Applied. DAVIES v. SWAN MOTOR CO. [1949] 2 K. B. 291

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June 2, 3, 5; *July* 28.

[HOUSE OF LORDS.]

BOY ANDREW (OWNERS) . . . APPELLANTS;

AND

ST. ROGNVALD (OWNERS) . . . RESPONDENTS.

Shipping — Collision — Negligence — Contributory negligence — Overtaking vessel—Passing too close—Change of course by leading vessel—Emergency—Liability.

While two steamships were proceeding on parallel courses in a mine-swept channel two cables wide marked by a central line of buoys, the larger, doing nine knots, made to overtake and pass the smaller, doing eight knots, on the starboard side at a lateral distance of one hundred feet. When the stem of the overtaking vessel was about level with the stern of the overtaken vessel, the latter suddenly swerved hard-to-starboard and, though the master of the overtaking vessel immediately gave the order "hard-a-starboard" and rang the engine room to "stop," there was a collision in which the overtaken vessel immediately sank with all hands. The cause of the swerve was never ascertained.

Held (per Viscount Simon, Lord Thankerton, Lord Porter and Lord Oaksey; Lord MacDermott dissenting) that both vessels, by synchronous faulty navigation, contributed to causing the accident, the overtaken vessel by failing to keep her course and the overtaking vessel by making to pass her too close, and that there

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* *Present:* VISCOUNT SIMON, LORD THANKERTON, LORD PORTER, LORD OAKSEY and LORD MACDERMOTT.

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was no question of considering which of the vessels had the last opportunity of avoiding the result of the other's negligence.

Admiralty Commissioners v. *Volute (Owners)* [1922] 1 A. C. 129, 136, 144, 145, applied.

Davies v. *Mann* (1842) 10 M. & W. 546, distinguished.

Per Viscount Simon: There is, in truth, no such rule as the test of "last opportunity." The question, as in all cases of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong? [See Report of the Law Revision Committee (Cmd. 6032 of 1939 p. 16).]

Decision of the First Division of the Court of Session, 1946 S. C. 223, reversed.

APPEAL from the First Division of the Court of Session.

The facts, summarized from their Lordships' opinions, were as follows: The collision between the two vessels in question occurred in the Firth of Forth at about 9.35 a.m. on November 9, 1941. The *Boy Andrew* was a steam herring drifter converted for naval service, flying the White Ensign, and employed by the Admiralty in anti-submarine work. She was 90 feet long, with 20 feet beam, and approximately 10 feet draught. The *St. Rognvald* was a British commercial vessel, a steel screw steamship of 1,069 tons gross register, 230 feet long, 31 feet beam, and her draught at the time of the collision was 12 feet forward and 17 feet 8 inches aft. Both vessels were proceeding on an easterly course in a mine-swept channel running east and west, which was two cables wide and was marked by a line of buoys placed in the centre of the channel at intervals of about a mile. The wind was from the south-east, of a strength of about five on the Beaufort scale, and there was an ebb tide setting to the eastward, running out at about 1½ to 2 knots. It was broad daylight and visibility was reasonably good. When the *St. Rognvald* entered the buoyed channel from Leith harbour, there were three vessels proceeding eastward along the channel ahead of her: a Ben Line ship immediately ahead, the *Boy Andrew* ahead of the Ben Line ship and ahead of that again a Norwegian ship, the *Sverre Nergaard*. The Ben Line ship overtook both the *Boy Andrew* and the *Sverre Nergaard* before the collision, passing the *Boy Andrew* on the latter's port side, and was not concerned in the subsequent events. At the time of the collision both the *Boy Andrew* and the *St. Rognvald* were overtaking the *Sverre Nergaard*, though she was not near enough to have any effect on their manœuvres. The pilot on the *Sverre Nergaard*, was, however, able to see the events and was called as a witness by the owners of the

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St. Rognvald, giving important evidence. The *Boy Andrew* was doing 8 knots before the collision and the *St. Rognvald* 9 knots. When the *St. Rognvald* had proceeded about three miles down the channel and was approaching No. 7 buoy, she had the *Boy Andrew* on her port bow. At the time both vessels were pursuing the same compass course, the *Boy Andrew*, being slightly to the north of the middle line of the southern half of the channel, thus leaving rather more than 300 feet of mine-swept water on her starboard side. The *St. Rognvald* was pursuing a parallel course on her starboard quarter about 100 feet in lateral distance to the south of the course of the *Boy Andrew* and she held to this course after passing No. 7 buoy. She continued to gain, approaching the *Boy Andrew*, and made to pass her at about 100 feet. When her stem was nearly but not quite level with the stern of the *Boy Andrew*, the latter made a move to starboard which suddenly developed into a swerve hard-a-starboard. In evidence, the master of the *St. Rognvald*, denied that he saw any sheering by the *Boy Andrew*. As to the events leading up to the collision, he said that the *Boy Andrew* suddenly altered course slightly to starboard and he had the impression at that time that " there would be a friendly greeting or something of that sort." He added that " the movement developed very suddenly into a " sudden swerve or hard-a-starboard and as soon as that " happened I gave the order to the helmsman hard-a-starboard " . . . . I rang very suddenly to stop." He admitted that there would have been no collision if the distance he had allowed for overtaking the *Boy Andrew* had been 200 feet. The pilot on the *Sverre Nergaard*, said in evidence that looking back he had seen the *Boy Andrew*, which was then fine on his starboard quarter, " sheering a little and pitching," when he observed her taking this sudden turn to starboard and formed the conclusion, which he expressed to the master of the *Sverre Nergaard*, that " this little fellow is going out of the " channel." The *Boy Andrew* ran across the bows of the *St. Rognvald*, was struck by her about 15 feet from the stern and was pushed bodily into the water, sinking with every one of the thirteen men on board, who were drowned. The cause of the unexpected move of the *Boy Andrew* remained a mystery. There was evidence that her steering gear had been inspected and overhauled a month before the collision and there was no evidence to show whether the movement by her was intentional or accidental. In an action between the owners of the vessels, the grounds of fault alleged against the *St. Rognvald* included (*a*) improperly attempting to pass too close to the *Boy Andrew* and (*b*) failing to ease, stop or reverse her engines in due time or at all. The grounds of fault alleged against the *Boy Andrew* included (*a*) failure to keep her course, and (*b*) failure to give warning of her change of course. The Lord Ordinary, Lord Keith, held that both vessels jointly were to blame and that the loss sustained by the owners of each should be borne to the extent of two-thirds by the owners of the *Boy Andrew* and to the extent of one-third by the owners of the *St. Rognvald.* The First Division of the Court of Session held that the *Boy Andrew* was alone to blame in that (*a*) while the *St. Rognvald* was in fault in giving insufficient clearance, this was not a contributing fault, since it should have been apparent to the *Boy Andrew*, and was antecedent to the *Boy Andrew's* fault in changing course, and (*b*) that it was not proved that the order "full steam astern" would have enabled the *St. Rognvald* to avoid the collision. Both courts and the nautical assessor in each court affirmed fault on the part of the *St. Rognvald* in attempting to pass too close to the *Boy Andrew.* The owners of the *Boy Andrew* appealed to the House of Lords.

Carpmael K.C. (of the English Bar) and *M'Lean* (of the Scottish Bar) for the appellants, the owners of the *Boy Andrew.* There are concurrent findings of fact by both the courts below that the *St. Rognvald* was guilty of negligence. That negligence contributed to the collision. The *St. Rognvald* did not comply with her duties as an overtaking vessel under art. 24 of the Regulations for Preventing Collisions at Sea, 1910, in that she failed to give the *Boy Andrew* a sufficiently wide berth and improperly attempted to pass too close to her, continuing on that course in such a way as to make it impossible for her to take effective steps to avoid or minimize collision when the *Boy Andrew* altered to starboard. Even if the *Boy Andrew* in altering her course was in breach of art. 21 of the Regulations, the effects of that breach could have been avoided had the *St. Rognvald* complied with her own duties instead of putting herself in a position in which she was unable to avoid that accident. The negligence of the *St. Rognvald*, though prior in point of time, was the sole cause of the accident, since, had she been further away, the time factor, on which the respondents rely, would have been materially lengthened and there would have been no collision. The present case is similar to *British*

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Columbia Electric Ry. Co., Ld. v. *Loach* (1). Further, the *St. Rognvald* was negligent in failing to reverse her engines, which would have been the most effective action and, since she was herself initially negligent, she is not entitled to avail herself of the excuse of the agony of collision. [They also referred to *M'Lean* v. *Bell* (2); *Anglo-Newfoundland Development Co., Ld.* v. *Pacific Steam Navigation Co.* (*The Bogota*) (3) and *United States of America* v. *Laird Line, Ld.* (4).] On the evidence, the *Boy Andrew*, which was a small vessel, had to contend with the confused sea caused by the meeting and opposition of wind and tide and, in the circumstances, her bows would naturally "yaw" from side to side. The movement now in question was merely a "yaw." If, however, she be held partially to blame, the *St. Rognvald* was yet more blameworthy and this is a case in which the distribution of blame by the judge of first intance should be altered: see *British Fame* (*Owners*) v. *Macgregor* (*Owners*) (5).

L. Hill Watson K.C. (of the Scottish Bar) and *Porges* (of the English Bar) for the respondents, the owners of the *St. Rognvald*. In making to pass the *Boy Andrew* as she did the *St. Rognvald* was not at fault. If her master had been right in thinking that the *Boy Andrew* wanted to hail her, it would have been wrong of him to increase the distance. It is a question of law whether or not the *St. Rognvald* was negligent and to fall short in perfection in seamanship does not necessarily amount to negligence in law. To behave so as to make allowances for unexpected occurrences, however unusual, is not called for either on sea or land, in ships or motor cars. An overtaking ship must not take such a course as to embarrass the overtaken ship but she does not have to provide against extraordinary happenings such as the one which occurred here. The master of the *St. Rognvald* denied that he noticed the "sheering" spoken of by the pilot on the *Sverre Nergaard* but by that expression he may have understood something more pronounced than "yawing" and in spite of the yawing considered it safe to pass at 100 feet. But even if the *St. Rognvald* was negligent, her negligence has not been shown to have contributed to the collision, for she did not make it harder for the *Boy Andrew* to keep her course and speed, in accordance with art. 21 of the Rules for Preventing Collisions at Sea, and did not cause her to starboard. Properly applied *British Columbia Electric Ry. Co., Ld.* v. *Loach* (1) is in the respondents' favour. In that case the wagon driven on to the level crossing would correspond to the *St. Rognvald* in this case; it could not get out of the way of the train, which would not have hit it, if the engine had had proper brakes. It was held that the railway company's negligence was the sole cause of the accident. The law in this respect is not materially different on sea and land and, in the present case, the sole cause of the accident was the negligence of the *Boy Andrew*, which had full opportunity of appreciating any negligence on the part of the *St. Rognvald*, in committing herself to pass at so short a distance, and which could have avoided all danger by porting. It was the *Boy Andrew's* duty to take steps to avoid the collision when she appreciated the *St. Rognvald's* breach of good seamanship. She should have kept her course and speed in accordance with r. 21 and this she failed to do. A collision was never likely or inevitable till she went to starboard. The fact that she was to blame is undoubted and firmly established, while the fault of the *St. Rognvald* in coming too near can be separated from the causes of the collision. In the present case the law was correctly laid down by Lord President Normand (2): see also *Admiralty Commissioners* v. *Volute* (*Owners*) (3); *Cayzer, Irvine & Co.* v. *Carron & Co.* (*The Margaret*) (4); *Spaight* v. *Tedcastle* (5); *Anglo-Newfoundland Development Co., Ld.* v. *Pacific Steam Navigation Co.* (*The Bogota*) (6); and *The Sans Pareil* (7). As to the question whether the *St. Rognvald* should have reversed her engines, even if effective astern action could have been taken and could have avoided the accident, this is a typical case for the application of the "agony" rule and the respondents cannot be held responsible because the master in the emergency with which he was faced and in the time at his disposal gave the order to stop instead.

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(1) [1916] A. C. 719.
(2) 1932 S. C. (H. L.) 21, 26.
(3) [1924] A. C. 406, 420.
(4) [1924] A. C. 286.
(5) [1943] A. C. 197.

Porges following. In *British Columbia Electric Ry. Co., Ld.* v. *Loach* (1) the driver of the wagon should have taken into account the fact that there might be a train coming but, on the well known principle, he was absolved from liability for the consequences of the accident because the driver of the train would have had the last opportunity of avoiding the accident

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(1) [1916] 1 A. C. 719.

(2) 1946 S. C. 223, 233.

(3) [1922] 1 A. C. 129, 136, 144.

(4) (1884) 9 App. Cas. 873, 883.

(5) (1881) 6 App. Cas. 217, 219.

(6) [1924] A. C. 406, 416.

(7) [1900] P. 267.

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but for his defective brakes. So here the prior negligence of the *St. Rognvald* was eliminated by that of the *Boy Andrew* which created the risk of collision at the end of the chain of events. The material time was the moment when the *Boy Andrew*, with all the facts available to take into account, starboarded.

[Viscount Simon. If the appellants are prepared to accept the conclusions of the Lord Ordinary, their Lordships do not require to hear argument in reply but if they contend that the *Boy Andrew* was not at all to blame the House will hear counsel further.

Carpmael K.C. In those circumstances I do not wish to add anything to my previous argument.]

The House took time for consideration.

July 28. Viscount Simon. My Lords, the relation between the *St. Rognvald* and the *Boy Andrew* was that of overtaking and overtaken vessels, and by art. 24 of the Regulations for Preventing Collisions at Sea the overtaking vessel was under a duty to " keep out of the way of the overtaken vessel," while by art. 21, the overtaken vessel was under a duty to " keep her course and speed." It may be useful to point out that these articles prescribing what is to be done when one ship overtakes another do not exactly correspond with the rules of the road. An overtaking motor is, of course, under the duty so to steer as to keep out of the way of the motor in front, but the motor in front is not bound, when about to be overtaken, to maintain its course, but, if there is room, may prudently provide more space for the overtaking car to pass by turning in towards the near kerb. The reason is that on land an overtaking car should overtake by passing on the right side of the vehicle in front, whereas at sea cases may arise when the overtaking ship will pass to port of the vessel it is overtaking and not to starboard. Hence at sea the overtaken vessel is required to maintain its previous course, at any rate until a collision is imminent, for to do otherwise might produce confusion and help to cause a collision.

While the *St. Rognvald* was approaching the *Boy Andrew* in order to pass her as above described, and when the stem of the former was nearly but not quite level with the stern of the *Boy Andrew*, the latter made a move to starboard, which suddenly developed into a swerve hard-a-starboard. Counsel for the appellants before us endeavoured to convince us that what happened was merely a "yaw" of the *Boy Andrew* of the sort which was caused to this comparatively small vessel of slight draught owing to the opposition of wind and tide. In such circumstances the bows of the drifter would naturally "yaw" from side to side, and the course she was pursuing could only be maintained by constant helm action to neutralize such "yaws." The House was advised by the two nautical assessors who were assisting us in matters of navigation that if the *Boy Andrew*, having regard to her draught, size and speed, was being properly kept as far as could be on her course, with the then state of wind, sea and tide, her bows would not be diverted by "yawing" from either side of the course she was endeavouring to steer by more than 25 feet from the middle line. It is quite evident from the evidence in the case that what occurred to the drifter immediately before the collision was a much more serious change of direction. There is no material in the evidence to show whether this fatal movement by the *Boy Andrew* was intentional or accidental. It was, of course, on the face of it; a breach of art. 21, and in the absence of any evidence pointing to any other conclusion, must be regarded as a negligent breach of the ordinary rules of proper navigation which caused, in whole or in part, the damage resulting from the collision. Both Lord Keith, who tried the case, and the First Division of the Court of Session (Lord President Normand, with Lords Moncrieff, Carmont and Russell) have held the *Boy Andrew* to blame for causing the disaster, and I agree with Lord Normand in his view (1) that "in the absence of any "reasonable explanation, I have no doubt that the Lord "Ordinary was correct in finding that the navigation of those "in charge of the *Boy Andrew* was grossly in fault." The matter on which Lord Keith and the Court of Session differed was as to whether the action of the *St. Rognvald* should also be regarded as a cause of the collision, so that both ships were to blame. Lord Keith thought this was the case, but Lord Normand and his colleagues took a different view. The point is a fine one, because both the courts in Scotland adopted the advice of their nautical expert that the course steered by the *St. Rognvald* was faulty in that she was aiming to pass the *Boy Andrew* too close. Our own nautical advisers take the same view. The House put to them the following question: "Please put out of your minds that an accident did happen in

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(1) 1946 S. C. 223, 232.

"this case and advise us whether, when the *Boy Andrew* was "following its course in the south band of the swept channel "and the *St. Rognvald* was on a parallel course to the south of "her, it was good seamanship in the circumstances for the "latter to steer to pass the former at 100 feet." The answer was: "We are agreed that it was not good seamanship in the "circumstances." I understand this to mean that before attempting to pass, the *St. Rognvald* should have starboarded so as to leave a wider berth between herself and the drifter, both in order to reduce the risk if the *Boy Andrew* happened to move somewhat nearer, and also to give the *St. Rognvald* more time to avoid a collision if a danger of this sort presented itself. The master of the *St. Rognvald* admitted in his evidence that there would have been no accident if the lateral distance had been 200 feet.

The ground on which Lord President Normand and his colleagues held that the *St. Rognvald*, though at fault in steering a course so close to that of the *Boy Andrew*, was not to be regarded as partly responsible for the collision was that they considered this fault as being merely a causa sine qua non, and not as contributing to the disaster. If indeed the navigation of the *St. Rognvald* did not operate as a cause of the collision, then, of course, the owners of that vessel are free from liability, however faulty the conduct of their vessel may have been. Negligence, whether on land or at sea, does not constitute a good cause of action unless it is a cause of the damage that occurs as the result of it. Lord Normand considered that the situation was analogous to that dealt with in the case of *Davies* v. *Mann* (1). In that famous case, the defendant's servant, by driving his wagon negligently along a highway, ran over and injured a donkey belonging to the plaintiff, which the latter had negligently left on the road, so hobbled that it could not get out of the way. The Court of Exchequer held that the injury was caused by the negligent driving of the wagon, and that the plaintiff could recover, notwithstanding that he, at an earlier stage, had been negligent in leaving the animal in this condition on the road. The principle in *Davies* v. *Mann* (1) has been approved and applied by this House in *Radley* v. *London & North Western Ry. Co.* (2), and in cases where it is relevant the principle can be applied to collisions at sea, no less than to road accidents. The principle of *Davies* v. *Mann* (1) has often been explained as amounting to a rule that

(1) (1842) 10 M. & W. 546.
(2) (1876) 1 App. Cas. 754.

when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. The suggested test of "last opportunity" seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their report (Cmd. 6032 of 1939, p. 16): "In truth, there is no such rule—the "question, as in all questions of liability for a tortious act, is, "not who had the last opportunity of avoiding the mischief, "but whose act caused the wrong?" In *Davies* v. *Mann* (1), the negligence of the absent donkey-owner, serious as it was, created a static position where nothing that he could do when collision threatened would have avoided the result, whereas the negligence of the driver of the vehicle continued right up to the moment when the collision became inevitable. As by driving more carefully he could have avoided hitting the donkey, his negligence was the sole cause. The negligence of the donkey-owner was therefore a fault not contributing to the collision: it was merely a causa sine qua non.

With the greatest respect, I am unable to see how the doctrine of *Davies* v. *Mann* (1) is applicable here. One may well ask: Which of these two vessels corresponds to the hobbled donkey? Both ships were moving and answering their helms, though the rule imposed on the *Boy Andrew* the duty of maintaining her course and speed. The Lord President considered that the *St. Rognvald* was in the donkey-owner's situation; he said (2): "Although the *St. Rognvald* was in motion, her position was "just as clearly defined and as calculable" (by those on the *Boy Andrew* who should have looked astern) "in relation to the "*Boy Andrew* as was the tethered donkey in relation to the "driver who drove over it in *Davies* v. *Mann* (1)." Surely this is treating the *St. Rognvald* as though she was moving along tramlines at a pre-destined speed, whereas she was able, if she chose, to starboard and to reduce her speed. The House put to its nautical advisers the question whether as a matter of seamanship a small vessel like the *Boy Andrew*, with a bigger ship coming up behind her at a lateral distance of 100 feet, would be entitled to expect the latter ship to steer so as to give her a wider berth when passing her, and we were advised that this might well be expected in the circumstances and would be the proper navigation. The truth is that the *St. Rognvald's* course was not stabilized in fact or in law. She could have given the *Boy Andrew* a wider clearance without

(1) 10 M. & W. 546. (2) 1946 S. C. 223, 232.

leaving the swept channel. The application of *Davies* v. *Mann* (1) when two vessels are about to collide was carefully discussed in the English Court of Appeal in *The Eurymedon* (2). This case was not referred to in the argument before the House, nor, I think, in the proceedings in Scotland ; but it is much in point. The *Eurymedon* was a large vessel coming up the Thames at night, and was held to blame for not reducing speed, owing to her failure to appreciate in time that the plaintiff's ship was lying at anchor in an improper position nearly athwart the river. The latter ship was also negligent in continuing to lie where she was, but contended that on the principle of *Davies* v. *Mann* (1) the *Eurymedon* should be held solely to blame. The contention failed. Greer L.J. analysed the *Davies* v. *Mann* (1) principle in a series of propositions of which the fourth is (3) : " If the " negligence of both parties to the litigation continues right up " to the moment of collision, whether on land or on sea, each " party is to blame for the collision and for the damage which " is the result of the continued negligence of both." This exactly applies here. I cannot agree with Lord Normand that (4) " the negligence of the *St. Rognvald* was in every practical sense " antecedent." The case seems to me to fall within the class described by Viscount Birkenhead L.C. in *Admiralty Commissioners* v. *Volute* (*Owners*) (5), where the proper conclusion is, as the Lord Ordinary found, that both vessels by faulty navigation contributed to the disaster.

Reference was made to the decision of the Judicial Committee in *British Columbia Electric Ry. Co., Ld.* v. *Loach* (6). There a wagon was negligently driven on to a gateless level-crossing without considering that a train might be just coming, and the collision occurred because the train approached the crossing at an excessive speed and, owing to faulty brakes, was unable to pull up in time. The Board, through the mouth of Lord Sumner, held that the railway company's negligence was the sole cause of the accident, and that this remained true even though the train's inability to stop was due to faulty driving and equipment originating before but continuing after the negligence attributed to Loach. The decision supports the view I take, that the *St. Rognvald* cannot escape liability.

The apportionment of blame decreed by the Lord Ordinary must stand. As indicated in the decision of this House in

(1) 10 M. & W. 546.
(2) [1938] P. 41.
(3) Ibid. 50.
(4) 1946 S. C. 223, 234.
(5) [1922] 1 A. C. 129, 144, 145.
(6) [1916] 1 A. C. 719.

British Fame (*Owners*) v. *Macgregor* (*Owners*) (1), an appellate court should not undertake to alter the proportions fixed by the judge who tried the case save in exceptional circumstances such as were there indicated, and no such exceptional circumstances are shown to exist here. I move that the interlocutor of Lord Keith be restored, and that the appeal be allowed with costs.

My Lords, my noble and learned friend, LORD THANKERTON, who is unable to be here, wishes me to say that he concurs in this opinion.

LORD PORTER. My Lords, the sole question for your Lordships' decision is who was to blame for a collision which took place between the steam drifter *Boy Andrew* and the steamship *St. Rognvald*. In the circumstances of the case, the duty of each vessel is clearly shown in arts. 24 and 21 of the Regulations for Preventing Collisions at Sea: the material portions being: Art. 24, " Notwithstanding anything contained in these rules, " every vessel, overtaking any other, shall keep out of the way " of the overtaken vessel . . . ." Article 21: " Where by " any of these rules one of two vessels is to keep out of the way, " the other shall keep her course and speed." Both rules are, of course, subject to the general provisions of art. 27: " In obeying and construing these rules, due regard shall be " had to all dangers of navigation and collision, and to any " special circumstances which may render a departure from the " above rules necessary in order to avoid immediate collision," and art. 21 itself contains the note: " When, in consequence of " thick weather, or other causes, such vessel finds herself so " close that collision cannot be avoided by the action of the " giving-way vessel alone, she also shall take such action as will " best aid to avert collision." But these qualifications do not entitle the overtaken vessel to alter her course or speed except in the face of immediate danger of a collision or excuse her if she takes premature action.

" The safe thing for the stand-on ship," said Scrutton L.J. in *Courtfield* (*Owners*) v. *Atlantis* (*Owners*) (2), " is to keep her " course and speed until it is clear that a collision cannot be " avoided," and see *The Orduna* (3). The obligation of the stand-on vessel is, I think, accurately stated in the article on Shipping and Navigation by the late Langton J. in Halsbury's

(1) [1943] A. C. 197.
(2) (1919) 1 Ll. L. Rep. 328, 330.
(3) [1921] 1 A. C. 250.

Laws of England (2nd ed.), vol. xxx, art. 983, p. 760, in the words: "The stand-on vessel is not justified in altering her course "because the other vessel is cutting it fine, since the other "vessel's action is guided by the presumption that the stand-on "vessel will keep her course," a statement in support of which the decision in *The Highgate* (1) is quoted, which seems to me none the less applicable though the stand-on vessel in that case was a sailing ship.

In these circumstances the Lord Ordinary held both vessels to blame, the *Boy Andrew* in two-thirds and the *St. Rognvald* in one third, but the First Division of the Court of Session reversed his judgment and found the *Boy Andrew* alone to blame. All nautical assessors in both courts below and in your Lordships' House have advised that, in the circumstances, to attempt to pass at 100 feet was negligent, since there was ample room to starboard and the space given did not make sufficient allowance for an accidental deviation, whether negligent or involuntary, which ought to have been envisaged as possible and which would bring the *Boy Andrew* across the course of the *St. Rognvald*, and this view was strengthened by the fact that wind and tide were meeting causing a confused sea and resulting in a yawing of the drifter which ought to have been and was not seen from the *St. Rognvald*. The master of the latter vessel was not asked whether he saw this yawing but denied that he saw any sheering. It was suggested on his behalf that he might by that word mean something more pronounced than yawing and despite the yawing deemed it safe to pass at 100 feet. I do not so read his evidence but I think his meaning immaterial since all the nautical assessors are agreed that as a matter of good seamanship he ought to have given a wider berth.

Each ship accepted the finding that she was to blame but maintained that her negligence was not the cause or even a cause of the collision. On behalf of the *Boy Andrew* it was said that notwithstanding her sheer the sole cause of the collision was the fact that the *St. Rognvald* by attempting to pass too close had put herself in such a position that she was unable to avoid an accident or at any rate that accident. That negligence it was submitted, was prior in point of time to the negligence of the *Boy Andrew*, and accordingly, it was said that under the ruling in *British Columbia Electric Ry. Co., Ld.* v. *Loach* (2), the *St. Rognvald* was alone to blame, since she had herself put

(1) (1890) 6 Asp. M. C. 512. (2) [1916] 1 A. C. 719.

it out of her power to avoid the accident by reason of her prior negligence. I cannot accept this contention. That the *Boy Andrew* was negligent is plain: it was her duty to keep her course and speed yet she starboarded right across the course of the *St. Rognvald*. Her fault had not ended before the collision took place; she was always in action and her wrong-doing persisted right up to the moment of this accident: she was always an active party in the final result: her negligence and that of the *St. Rognvald* were at least contemporaneous and some blame—perhaps the major portion though not necessarily the whole—must be attributed to her. The *St. Rognvald*, however, argued that, whatever might be her fault, the *Boy Andrew* alone caused the accident by a manœuvre which no one could have anticipated, and in any case could have avoided the collision by porting when she realized that the *St. Rognvald* was committed to passing at so short a distance. That the accident was unpredictable and unforeseeable is not in my view material. The very reason for which it is undesirable to pass so close is that accidents will happen, seamen like everyone else may be negligent and a prudent ship-master ought to envisage an aberration of course, even beyond that which a more skilful or more careful captain would avoid. Neither, as I think, is it to the point that the particular accident was such as no seaman would expect. It is enough that the second ship should have foreseen the possibility that some occurrence, which was not abnormal, might bring the first vessel across her bows even though that event would not happen save for the negligence of the first.

But, it is said, such a view is merely to prove negligence, not to establish that negligence as the cause or a cause of the collision. The argument is perhaps most forcibly and attractively put in the judgments of the Inner House. The *Boy Andrew*, it is suggested, could see the course of the *St. Rognvald* throughout and finding her approaching negligently close should have gone to port so as to allow the sea room which that vessel failed to give. She could, therefore, have avoided the accident in the end and was solely to blame. In my opinion there are two answers to this argument, one of fact and one of law. As to the facts your Lordships' House asked the assessors who advised it up to what moment those navigating the *Boy Andrew* might reasonably expect the *St. Rognvald* to move to starboard so as to give her more room when passing. Their answer, as seamen, was "up to the last minute." But even if no such answer had been given the fact cannot be neglected that it was the duty of the *Boy Andrew* to keep her course and speed and to take no other step unless and until an accident appeared inevitable unless she took some step. It has not been suggested, so far as I understood, nor do I think it could rightfully be contended that any such stage had been reached. Of course, if it could be shown that the *Boy Andrew* deliberately took the risk of starboarding across the course of the *St. Rognvald* it might be said that she caused the collision by a deliberate act taken in defiance of all rules of prudence. But I do not take the view that such a deduction should be drawn. The true inference is, I think, that by an incorrect order or a correct order wrongly interpreted, or by a yaw which the master or helmsman negligently failed to correct in time the drifter took the unexpected sheer. Until then it was her duty to keep and she did keep her course and speed.

There are undoubtedly cases in which one vessel involved in a collision having been negligent is yet not the cause or one of its causes in the sense in which that word is legally interpreted because the other vessel involved failed by a subsequent and independent fault to avoid the consequences of that negligence. *Spaight* v. *Tedcastle* (1), *Cayzer, Irvine & Co.* v. *Carron Co.* (*The Margaret*) (2), and *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.* (*The Bogota*) (3) are examples of cases in which this principle has been followed in your Lordships' House ; but to make it applicable the negligence of the second ship, must, in truth, be subsequent and severable or independent.

The approach to the decision in this class of case has, in my opinion, never been more accurately stated than in the speech of Viscount Birkenhead L.C. in *Admiralty Commissioners* v. *Volute* (*Owners*) (4) : " In all cases of damage by collision on land or " sea, there are three ways in which the question of contributory " negligence may arise. A. is suing for damage thereby received. " He was negligent, but his negligence had brought about a " state of things in which there would have been no damage if " B. had not been subsequently and severably negligent. " A. recovers in full . . . . At the other end of the chain, A.'s " negligence makes collision so threatening that though by the " appropriate measure B. could avoid it, B. has not really time " to think and by mistake takes the wrong measure. B. is not

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(1) 6 App. Cas. 217.
(2) 9 App. Cas. 873.
(3) [1924] A. C. 406.
(4) [1922] 1 A. C. 129, 136.

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" held to be guilty of any negligence and A. wholly fails . . . . " In between these two termini come the cases where the negli-" gence is deemed contributory, and the plaintiff in common law " recovers nothing, while in Admiralty damages are divided in " some proportion or other." And again (1): " Upon the " whole I think that the question of contributory negligence " must be dealt with somewhat broadly and upon common-" sense principles as a jury would probably deal with it. And " while no doubt, where a clear line can be drawn, the subse-" quent negligence is the only one to look to, there are cases in " which the two acts come so closely together, and the second " act of negligence is so much mixed up with the state of things " brought about by the first act, that the party secondly negli-" gent, while not free from blame under the *Bywell Castle* (2) " rule, might, on the other hand, invoke the prior negligence " as being part of the cause of the collision so as to make it a " case of contribution. And the Maritime Conventions Act " with its provisions for nice qualifications as to the quantum " of blame and the proportions in which contribution is to be " made may be taken as to some extent declaratory of the " Admiralty rule in this respect." My Lords, in *Cayzer, Irvine & Co.* v. *Carron Co.* (*The Margaret*) (3) Lord Blackburn expressed the opinion that the rule was the same in Admiralty as at common law and whatever may have been the position before the common law was altered, I think it clearly is the same to-day when the common law rule has been brought into line with that obtaining in Admiralty and in each the problem should be approached broadly avoiding those fine distinctions which were apt to be drawn when some slight act of negligence on the part of the plaintiff might defeat his claim altogether. In the present case there seems to me to be no clear dividing line between the operation of one act of negligence and the other. Both were, I think, in operation at the same time and both seem to me to have contributed to the accident.

The only further act of negligence on the part of the *St. Rognvald* seriously relied upon by the drifter was a failure to reverse her engines. I cannot think that such an omission had any real effect. The Lord Ordinary found that it had not, and he has the support of his assessor, and the Inner House found that they had no sufficient material before them to give effect to such an argument. In these circumstances I do not

(1) [1922] 1 A. C. 129, 144.
(2) (1879) 4 P. D. 219.
(3) 9 App. Cas. 873, 881.

think it is incumbent on your Lordships to determine how far a ship partially to blame can rely upon the rule that a navigator is excused for a wrong action, if that action is brought about by a sudden emergency arising from the action of another ship.

I would allow the appeal, restore the judgment of the Lord Ordinary and, in accordance with your Lordships' general practice, would leave the proportion of blame unchanged.

LORD OAKSEY (read by LORD MACDERMOTT). My Lords, I agree. The sheering of the *Boy Andrew* to starboard is, in the unhappy circumstances of this case, unexplained and she must therefore be held to blame. But the judgment of the First Division of the Inner House proceeds, I think, upon the view that she was also to blame for not keeping a proper look-out aft and that she, therefore, had a last opportunity of avoiding the fault of the *St. Rognvald* in overtaking the *Boy Andrew* without giving her sufficient clearance. In my opinion the inference that there was no proper look-out in the *Boy Andrew* cannot properly be drawn, for at any moment the *St. Rognvald* might have steered to starboard and so given the *Boy Andrew* adequate clearance. The *Boy Andrew's* duty was to keep her course and speed and she was entitled to assume that the *St. Rognvald* would keep out of the way. That the *St. Rognvald* was in fault has been held by both courts and by all the nautical assessors, including those who have advised your Lordships, and, in my opinion, that fault continued up to and at the very moment that the *Boy Andrew* committed her fault in sheering to starboard. The two faults were, in my opinion, contemporaneous and I can see no ground for holding that the fault of the *St. Rognvald* was not synchronous or had become a stabilized factor like the tethered donkey in *Davies* v. *Mann* (1).

LORD MACDERMOTT. My Lords, all the nautical assessors who have advised during the course of this litigation are agreed that the lateral clearance of approximately 100 feet which the *St. Rognvald* gave the *Boy Andrew* in overtaking on her starboard side was insufficient and out of keeping with the standards of good seamanship. Both the Lord Ordinary and the First Division accepted this view and held the *St. Rognvald* at fault in this respect. They also held that the *Boy Andrew*, in making the sudden and unexpected swerve to starboard which brought her across the bows of the overtaking vessel was at fault in a manner which directly contributed to the accident. And, further, they found that the *St. Rognvald* was not at fault in the efforts she made to avoid collision after the *Boy Andrew's* change of course. My Lords, there was ample material on which to reach these findings and it is clear they must stand.

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(1) 10 M. & W. 546.

In these circumstances the first question to be determined is whether the fault found against the *St. Rognvald* in fact contributed to the collision. This must depend on whether a clearance sufficient to satisfy the requirements of good seamanship would have enabled her to avoid the *Boy Andrew* when the latter made her strange turn to starboard. The material available to found a conclusion on the point is scant. But there was evidence that a lateral distance of 200 feet would have allowed the *St. Rognvald* to keep clear, and it is plain that this could have been given without bringing that vessel too close to the unmarked southern edge of the swept channel and the perils which might reasonably be supposed to lurk beyond it. I do not think the advice of the assessors can be interpreted as meaning that a prudent mariner, overtaking in these narrow waters, would have anticipated the *Boy Andrew's* sudden move and have regulated his distance accordingly. But on the whole evidence, and in all the circumstances, I think there is enough (though perhaps not much more) to sustain the conclusion that good seamanship would have left the *St. Rognvald* in a position to keep clear and, accordingly, that her fault must be regarded as contributing in some degree to the accident. It should, however, be added that there was neither finding nor evidence that this fault would, in itself, have caused a collision under the conditions then prevailing. It must rank as a factor because, and only because, it left the *St. Rognvald* in a position which made collision inevitable when the drifter swung across the channel.

The next question is whether, notwithstanding this conclusion, the fault of the *Boy Andrew* should be regarded in law as the sole cause of the collision; or, to put it another way, whether the fault of the *St. Rognvald* was but a causa sine qua non. My Lords, notwithstanding the provisions of the Maritime Conventions Act, 1911, this question has still to be settled according to common law rules. The apt test in the present case may be taken from Viscount Birkenhead's well-known illustration in *Admiralty Commissioners* v. *Volute* (*Owners*) (1). Was the *Boy Andrew* subsequently and severably negligent? The same decision gives important guidance on the manner of applying this test. The answer should not rest on over-fine distinctions or on the sort of analysis which makes various actions and reactions appear to stand apart when, in fact, they were mixed up or pressed together. A line is not to be drawn between the negligent acts unless it can be drawn clearly. " The " question of contributory negligence must be dealt with " somewhat broadly and upon commonsense principles as a " jury would probably deal with it " (1).

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(1) [1922] 1 A. C. 129, 136.

There is another matter to which I would refer before returning to the facts. Once started, the negligence of each ship continued up to the moment of impact. It was said that in law this precluded any finding other than one of joint responsibility. There is, indeed, support for this proposition in certain dicta of the Court of Appeal in *The Eurymedon* (2), but in my opinion it is too absolute to be sound and more likely to hinder than help the broad treatment enjoined in *Admiralty Commissioners* v. *Volute* (*Owners*) (3). It appears to be in conflict with the view of this House as expressed by Lord Wright in *M'Lean* v. *Bell* (4) ; and, apart from *Davies* v. *Mann* (5) itself and the instances given by Parke B. in the concluding paragraph of his judgment in that case, there is, I apprehend, ample authority in decisions of your Lordships' House for the view that the continuance of the negligent acts concurrently for some period ending with the accident is not necessarily incompatible with one of such acts being subsequent to the other and the sole cause in law of the damage. See, for example, *Cayzer, Irvine & Co.* v. *Carron Co.* (*The Margaret*) (6) ; *Cork Steamship Co., Ld.* v. *Kiddle* (7) (both cited in *Admiralty Commissioners* v. *Volute* (*Owners*) (3)) ; and *Anglo-Newfoundland Development Co., Ld.* v. *Pacific Steam Navigation Co.* (*The Bogota*) (8).

In the present case both vessels were pursuing parallel courses before the emergency arose. The *Boy Andrew* was proceeding in a manner which gave no indication of fault on her part. The *St. Rognvald* was coming up too close. The rapid change in this situation is best described in the words of the Lord Ordinary. " After passing buoy 7," he says (9), " the *St.*

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(1) [1922] 1 A. C. 129, 144.
(2) [1938] P. 41.
(3) [1922] 1 A. C. 129.
(4) 1932 S. C. (H. L.) 21, 30.
(5) 10 M. & W. 546.
(6) 9 App. Cas. 873.
(7) (1920) 2 Ll. L. Rep. 505.
(8) [1924] A. C. 406.
(9) 1946 S. C. 223, 225.

" *Rognvald* made to overtake the drifter on her starboard side " at a lateral distance between the vessels of about 100 feet. " At this point the drifter made a move to starboard which " suddenly developed into a sudden swerve hard to starboard. " The *St. Rognvald* was then on the starboard quarter of the " *Boy Andrew* and her stem must have been nearly but not " quite level with the stern of the *Boy Andrew*." Now, at that time it was daylight, visibility was reasonably good and the position of the overtaking vessel plain to be seen. As the Lord Ordinary further remarked (1): " Any observation aft from " the *Boy Andrew* must have disclosed the proximity of the " *St. Rognvald* and shown that any movement to starboard by " the *Boy Andrew* at the time the movement was made was " fraught with the gravest peril." Yet, without warning the drifter swerved across the *St. Rognvald's* bows and made inevitable the collision which occurred but a minute or less afterwards.

If, as has been found, this movement was negligent it must, I think, follow that the *Boy Andrew* failed to take due care for her own safety. She knew, or ought to have known that she was being overtaken. That is the basis of the fault of not maintaining course found against her. And she knew, or ought to have known, when she starboarded that the *St. Rognvald*, then committed to passing too closely, was in a position which made any reduction in the lateral interval highly dangerous. The reason for the drifter's swerve is unknown, but in that situation the explanation does not seem material when once her action has been held negligent.

Was this negligence subsequent ? On the facts I regard it as clear that it was, for the *Boy Andrew* did nothing to contribute to the accident until the fault of the *St. Rognvald* had brought her to a position which should have warned the drifter that a move to starboard " was fraught with " the gravest peril." The time which the *Boy Andrew* had to realize the risks of not maintaining course may not have been lengthy. But it must have been appreciable and it was, to my mind, sufficient to mark her fault as subsequent without resort to any fine distinctions. This matter of time has to be considered in relation to all the material circumstances and, in particular, to what the demands of reasonable skill and care on the part of the *Boy Andrew* were. If she had

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(1) 1946 S. C. 226.

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been forced to manœuvre, an appropriate allowance would have to be made. But in fact all she had to do was to do nothing but keep her course and speed.

If then, as I would hold, the *Boy Andrew's* negligence was subsequent, was it also severable? I think it was. The negligent acts were distinct and independent. There is nothing in the available material to show that the fault of the *St. Rognvald* in any way hampered the due navigation of the drifter or induced a single false step on her part. Indeed, it may well be said that this tragic event occurred not because the conduct of the *St. Rognvald* affected the navigation of the *Boy Andrew*, but because it did not. I am not unmindful that your Lordships' assessors expressed the view that the *Boy Andrew* could reasonably have expected the *St. Rognvald* to sheer off and give more room as she came up to pass. This might be important if the fault charged against the overtaken ship was that she did not seek safety by going to port. But as things are it cannot account for what happened and has, in my view, no real significance.

For these reasons I am of opinion that the fault of the *Boy Andrew* was both subsequent and severable and that she alone was to blame. I would, accordingly, affirm the interlocutor of the First Division and dismiss the appeal.

Appeal allowed.

Solicitors for appellant: *Treasury Solicitor for Boyd, Jameson & Young, W. S., Edinburgh.*

Solicitors for respondents: *Ince & Co., for Beveridge, Sutherland & Smith, W. S., Leith, and Morice & Wilson, Aberdeen.*

[PRIVY COUNCIL]

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July 30;
Dec. 8.

BATTAN SINGH AND OTHERS . . . . APPELLANTS;

AND

AMIRCHAND AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Fiji—Will—Testator enfeebled by disease—Memory deficient—Existence of near relatives forgotten—Estate left to strangers—Will invalid.

A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations, and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid: *Banks* v. *Goodfellow* (1870) L. R. 5 Q. B. 549, 565; *Harwood* v. *Baker* (1840) 3 Moo. P. C. 282; *Sivewright* v. *Sivewright's Trustees* 1920 S. C. (H. L.) 63, 64. Where, therefore, a testator, in the last stages of consumption and reduced by disease to extreme weakness, had declared in his will, which was made the day before he died, and by which he left all his property absolutely to the respondents, who were in no way related to him, that he had no relations anywhere, though if he had been of sound mind in the sense of the cases above cited he must have known that the statement was untrue and that he had four nephews, the will was the product of a man so enfeebled by disease as to be without sound mind or memory at the time of execution, and the disposition of his property under it was the outcome of the delusion touching his nephews' existence, and the will was therefore invalid.

The principle enunciated in *Parker* v. *Felgate* (1883) 8 P. D. 171 should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, but to a lay intermediary who repeats them to the solicitor. The court, before making any presumption in favour of validity, ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor.

Judgment of the Supreme Court of Fiji reversed.

APPEAL (No. 24 of 1946) from a judgment and decree of the Supreme Court of Fiji in its Probate jurisdiction (June 1, 1945), decreeing probate of a will dated April 3, 1944.

The question at issue in this appeal was whether the will of April 3, 1944, of one Jaimal, an Indian moneylender, who

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* *Present*: LORD ROCHE, LORD NORMAND and MR. JAMES STRATFORD.

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died on the following day, in favour of the respondents Amirchand and Mehar, was a valid will, or whether a will dated February 25, 1944, in favour of Jaimal's nephews ought to be admitted to probate, on the ground, inter alia, that the testator was not at the time he executed the former will of testamentary capacity.

The Supreme Court of Fiji (Corrie C.J.) decreed probate of the will of April 3, 1944.

The facts and the terms of the will of April 3, 1944, appear from the judgment of the Judicial Committee.

1947. June 12, 16. *Sir Herbert Cunliffe K.C.* and *Jopling* for the appellants. The respondents Amirchand and Mehar failed to discharge the burden laid on them of proving that Jaimal was of testamentary capacity on April 3, the day before his death, or on March 31, when Hari Charan visited him, and the learned judge erred in law in finding that the alleged conversation with Hari Charan was equivalent to instructions to a solicitor of the nature considered in *Parker* v. *Felgate* (1). In that case the testatrix personally gave her instructions—actually saw her solicitor; that is the distinction between that case and this. If definite and precise written instructions are given and the will is prepared in accordance therewith then *Parker* v. *Felgate* (1) will apply, but it has nothing to do with the present case which is dealing with a totally different state of affairs. *Perera* v. *Perera* (2) does not carry the matter much further. There is no proof here that Hari Charan was given authority to give instructions to the solicitor. The burden of proving that Jaimal had understanding of the nature of the business in which he was engaged, a recollection of the property he meant to dispose of, of the persons who had a claim to be the objects of his bounty and the manner in which it was to be distributed was on the respondents Amirchand and Mehar, and they did not discharge that burden. The will itself shows that the testator had no knowledge at all of his close relations, the natural objects of his bounty, in whose favour he had made a will only five weeks earlier. Having regard to the state of health of the testator and the fact that he was so near his death, the burden on the respondents could only have been discharged by the clearest independent evidence, which evidence was wholly lacking in this case. It is impossible to believe that the testator would

(1) (1883) 8 P. D. 171.

(2) [1901] A. C. 354.

have made the disposition which he did make unless he had become subject to delusions or was under undue influence. The finding of the learned Chief Justice was wrong in law and was not supported by any credible evidence.

Jopling followed. Jaimal's declaration in his will that he had no near blood relations showed that he was not of sound disposing mind: *Banks* v. *Goodfellow* (1); *Harwood* v. *Baker* (2). There is no doubt that in *Parker* v. *Felgate* (3) the testator discussed with her solicitor the nature of the dispositions, and it was merely a question of the formal act: it was an exceptional case and entirely different from the present one. If the Board come to the conclusion that the testator was not of a sound disposing mind in the circumstances of this case, that is enough.

Khambatta K.C. and *Umrigar* for the respondents Amirchand and Mehar. First, there is evidence here that the testator had repeatedly expressed to independent witnesses a previous and independent intention of making a will in favour of these respondents and not in favour of his nephews. Secondly, there is evidence that in spite of such previous independent intention there was no undue haste on the part of these respondents to have the will made in their favour. Thirdly, there is evidence of independent witnesses that at no time before the execution was the testator suffering from feebleness of mind—senile decay. Lastly, there is evidence that the contents of the will were made clear to the testator at the time of execution, first by the solicitor, and secondly by the solicitor's clerk. The testator knew the contents of the will, and at the time of execution he was in a state of mind to judge the propriety of his dispositions. The Chief Justice had the whole case before him, heard the oral evidence for eight days, and found that the will was duly executed and that at the time of giving instructions and at the time of the execution Jaimal knew and approved of its contents. That finding really disposes of this appeal. He also found that there was no evidence of undue influence by the respondents. The burden of proof, which is on these respondents, of removing suspicion, has been discharged; there is also an express finding that the appellants' oral evidence did not establish undue influence. The question whether or not oral evidence as a whole is such as to satisfy the conscience of the court that the testator was of testamentary capacity at the time of execution is a question of fact on which the judge who tried the case is best qualified to express an opinion. If this case has to be brought within *Parker* v. *Felgate* (1) the evidence does bring it within it, and there was no error in law on the part of the Chief Justice in arriving at his double finding. The statement of the law in *Harmes* v. *Hinkson* (2) covers the present appeal. The Chief Justice having accepted the solicitors' evidence, and having come to the conclusion that the will was carried out in accordance with the instructions, and that the testator so understood the will to be carried out, and that at the time of execution as well as of instruction he was of testamentary capacity, this appeal should not succeed. An appellate court has not here sufficient material on which to set aside the finding of the Chief Justice, and there is no error in law which makes that finding manifestly wrong.

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(1) (1870) L. R. 5 Q. B. 549, 567.

(2) (1840) 3 Moo. P. C. 282, 285, 306.

(3) 8 P. D. 171.

Sir Herbert Cunliffe K.C. replied. If the testator knew and approved of what was in the will it is clear that his mind, memory and understanding were under a delusion that he had no relatives. Due execution means that he had knowledge of and approved of the contents of the will. The will bears on the face of it the best evidence that he was not of sound mind and understanding—the statement that he has no relative anywhere. It comes back to whether at the time when he executed this will his mind, memory and understanding were not affected.

July 30. The judgment of their Lordships was delivered by LORD NORMAND. This is an appeal from a judgment and decree of the Supreme Court of Fiji in its Probate Jurisdiction which decreed probate of a will dated April 3, 1944, of an Indian named Jaimal, who died on the day after the execution of the will. The issue to be decided is whether that will, which was in favour of the respondents Amirchand and Mehar as the sole beneficiaries, is valid or whether a will dated February 25, 1944, in favour of the testator's nephews ought to be admitted to probate.

The testator was a Sikh who had come to Fiji about thirty-eight years before his death. He had made a considerable fortune as a moneylender and his estate amounts to more than 20,000*l*. He was illiterate and ill-educated but he could write his name in English. Amirchand and Mehar were in no way related to him, but they were both indebted to him at his death, Amirchand for about 400*l*. and Mehar for 6,500*l*. The testator had no wife or child, but he had had a brother who lived in India and who died about 1940 or 1941. This brother had four sons, the beneficiaries under a will of November 26, 1941, which was confirmed by a codicil of July 1, 1942, and they and their father had been the beneficiaries under a still earlier will of January 21, 1938. It is proved that the testator had been on affectionate terms with his brother, to whom he paid a prolonged visit in India in 1938 to 1940, and that he was also on good terms with his nephews, to two of whom he had at one time given a power of attorney to enable them to deal on his behalf with certain property belonging to him in India. He employed a firm of solicitors in Fiji, Messrs. Ellis Munro Warren & Leys, to attend to his affairs, and this firm had been instructed by him to draw up the testamentary writings above referred to except the final and disputed writing of April 3, 1944. Jaimal became gravely ill with pulmonary tuberculosis, and in the early part of 1944 he was in the Suva Government hospital. He left that hospital in February and went to the Sikh temple at Samabula. It was while he was at this temple that he executed the will of February 25, 1944, appointing the President, Secretary and Treasurer of the Sikh Gurdwara Committee at Samabula, Suva, to be his executors and trustees and leaving all his property to his four nephews equally. Amirchand was present at the making of this will. Shortly afterwards, as Jaimal wanted to enter the Lautoka hospital at Ba, Amirchand brought him to a stable near Mehar's house at Ba in which he stayed for a few days before entering the hospital. He removed from there to the Sikh Gurdwara at Lautoka, and was next taken to a house hired by Mehar at Yalaleva, where he arrived about two or three weeks before his death. On Friday, March 31, he received a visit from a young man named Hari Charan, who as a boy about twelve years earlier had had some acquaintanceship with him. Hari Charan gave evidence that this was the third visit that he had paid to Jaimal in as many weeks and that it was a casual visit. Jaimal, however, on this occasion, is said to have lost no time in taking Hari Charan into his confidence about his testamentary intentions. According to Hari Charan, whose evidence the learned Chief Justice appears to have accepted only because it was uncontradicted, Jaimal told him that he wished to make a will in favour of Mehar and Amirchand because they had looked after him so well, and he asked Hari Charan to get a lawyer to draw up a will for him. Hari Charan asked whether he had ever made a will before and Jaimal said he had made two, but that he was not worrying about them and that he wished to make his last will in favour of these men. He also said that he had neither wife nor children but that he had relatives "regarded "as brothers" in India to whom he had given sufficient property in the way of money and assets. It does not appear from Hari Charan's examination in chief that Jaimal asked him to do more than to get a lawyer for him, but in his cross-examination he says that Jaimal asked him to get a will drawn up in favour of Amirchand and Mehar. Hari Charan went on the same day to Mr. Davidson, a lawyer in Fiji, and gave him instructions which enabled Mr. Davidson to draw up the will. Amirchand accompanied Hari Charan to Mr. Davidson's office, but remained outside, and Mr. Davidson is said to have had no direct communication with him that day. The will is in the following terms:

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(1) 8 P. D. 171. (2) [1946] W. N. 118.

"This is the last will and testament of me Jaimal (Father's "name Nehala) formerly of Suva but now of Yala Levu in the "District of Ba in the Colony of Fiji 'Financier' I revoke all "former wills and testamentary dispositions made by me and "declare this to be my last and only will after payment of all "my just debts funeral testamentary and medical expenses "I give devise and bequeath unto my dear friends Amirchand "(Father's name Utham) and Mehar (Father's name Saudi) "both of Yala Levu aforesaid Farmers as tenants in common "in equal shares absolutely all my estate and property whatsoever and wheresoever situate and whether in possession "reversion or remainder and I appoint them the said "Amirchand and Mehar to be the trustees and executors of this "my said will. I declare that I have no next of kin nor "blood relations in Fiji or elsewhere who are known to me "I desire to express by this my said will my deep gratitude "to the said Amirchand and Mehar for their devotion to me "during my present illness."

Mr. Davidson deponed that the expressions of affection for and gratitude to Amirchand and Mehar were inserted by him of his own volition and without instructions from Hari Charan, and that for the statement that the testator had no next of kin nor blood relations in Fiji or elsewhere his only warrant was Hari Charan's statement that Jaimal had no wife or children and that he inferred the rest. Mr. Davidson typed out this draft will either on the afternoon of Friday, March 31, or the next morning. According to their evidence, Amirchand and Hari Charan had expected Mr. Davidson to deal with the will as a matter of urgency, and as no progress had been made by Monday morning they went in a taxi cab to his office and fetched him to see Jaimal. Mr. Davidson said that he put questions to Jaimal and read over the will in Hindi and then in English, which was again translated into Hindi by his clerk: that Jaimal listened carefully and at the end gave his assent to the will and said he wanted nothing in it changed: that among other questions put to Jaimal before he gave his final assent, Mr. Davidson asked who Amirchand and Mehar were, and Jaimal put a hand on each of these two men and spoke with affection of them and said he wanted to give them all his property. In answer to other questions he said they were the only persons who had helped him in his illness, that he had no relations in Fiji and that he did not know if he had any relations elsewhere than in Fiji. Mr. Davidson also said he was told by Jaimal that he had made a previous will, but Mr. Davidson asked no questions about its contents. Jaimal tried to sign the will, but his hand was too shaky. He then tried to affix his thumb mark, but he was too weak to do so unaided and Mr. Davidson had to help him. Mr. Davidson considered that Jaimal was a very sick man though his mind was perfectly logical. He also formed the opinion that Jaimal was not receiving adequate medical treatment, and he said so to Amirchand. Amirchand and Mehar were present in the room with Mr. Davidson and Jaimal during the whole interview between them, and it is significant that Amirchand, who must have heard the questions and answers about Jaimal's relations and who must also have known from being present when the earlier will was made that Jaimal had nephews in India, did not intervene to correct Jaimal's memory. Amirchand, in his own evidence, which was disbelieved by the learned Chief Justice, falsely depones that he did intervene to say that Jaimal had nephews in India. It was no doubt in consequence of Mr. Davidson's advice that Amirchand took Jaimal to a hospital in the afternoon. Jaimal was by that

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time unable to speak. The doctor found that he was in a very weak condition, but gave him some medicine and told Amirchand to take him home. Jaimal died next day.

The objections to the validity of the will of April 3, 1944, urged in the court below were :—(1.) that it was not duly executed according to the provisions of the Wills Act, 1837; (2.) that Jaimal was not, when he executed it, of sound mind, memory or understanding; (3.) that the execution was obtained by the undue influence of Amirchand and Mehar; and (4.) that Jaimal did not know or approve the contents. The learned Chief Justice summarily rejected the first, third and fourth of these objections. In the appeal to their Lordships' Board nothing was said in support of the first objection, which was merely a technical objection to the authentication of the will. Nor was it maintained that Jaimal did not know the contents of the will in the sense that he did not understand the meaning and effect of the words read to him. It was no longer denied that he gave his assent. The charge of undue influence was not abandoned at the hearing of this appeal, but it was not pressed because, as counsel for the appellant explained, the evidence on which he relied for proof of undue influence was in part the evidence relied on for proof that Jaimal was not of sound mind, memory or understanding, and if it was not sufficient to establish that ground of objection it would not suffice to prove the undue influence. The issue of undue influence is in this case purely one of fact and, as the learned Chief Justice has found in favour of the respondents, their Lordships would not be disposed to reverse his finding though the evidence gives reason for the gravest suspicion.

The issue whether Jaimal was of sound mind, memory and understanding was decided by the learned Chief Justice on what seems to their Lordships a misunderstanding of *Parker* v. *Felgate* (1). That case decided that if a testator has given instructions to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings, and if the solicitor prepares the will in accordance with these instructions, the will will stand good, though at the time of execution the testator is capable only of understanding that he is executing the will which he has instructed, but is no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them. The learned Chief Justice applied this case by holding that Jaimal gave

(1) 8 P. D. 171.

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instructions to Hari Charan at a time when his memory was not proved to be defective; that these instructions were properly embodied in the draft will by Mr. Davidson; that Jaimal was able to understand the will and to give his assent to it on the day of execution, and therefore that Jaimal was of sound disposing mind at that date.

The principle illustrated in *Parker* v. *Felgate* (1) and in the similar case of *Perera* v. *Perera* (2) has, in their Lordships' opinion, no application to the present case. Apart from the single answer already noticed in cross-examination the tenor of Hari Charan's evidence is that Jaimal merely asked him to obtain a lawyer to draw his will. The words spoken to by Hari Charan in the examination in chief are " will you procure " a lawyer for me to draw up the will," and in another place he was asked " and he asked you to get a lawyer for him and " you promised to do so ? " and answered " That's right." Their Lordships would be reluctant on this evidence to take it as proved that Jaimal asked Hari Charan to give specific instructions to a solicitor on his behalf. Nor is it apparent from Hari Charan's account of the conversation that Jaimal intended to leave the whole of his property, wherever situated, to Amirchand and Mehar to the exclusion of his relations, and Hari Charan does not speak of any express direction that the previous will should be destroyed or cancelled. The learned Chief Justice has made no specific finding but has tacitly assumed that Hari Charan received specific instructions which he was to transmit to a solicitor to draw a will cancelling all previous wills and leaving all that Jaimal possessed to Amirchand and Mehar equally between them. Their Lordships are further of opinion that the principle enunciated in *Parker* v. *Felgate* (1) should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity.

The learned Chief Justice was accordingly not entitled to

(1) 8 P. D. 171. (2) [1901] A. C. 354.

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conclude, as he did, that it was unnecessary to determine what was the condition of Jaimal's memory on the day when the will was executed. That was indeed the only day on which Jaimal was seen by Mr. Davidson, and it is plain from Mr. Davidson's evidence that though he had drafted a will on information supplied to him by Hari Charan with, as he supposed, the authority of Jaimal, he was not satisfied until he had obtained instructions from Jaimal himself. There were, moreover, in the draft will, as has been seen, statements which Mr. Davidson had inserted of his own volition and he said he was at pains to put these statements to Jaimal. One of these was the statement that Jaimal had no next of kin nor blood relations in Fiji or elsewhere. It was on this statement that the appellants chiefly founded the argument that the testator was not of sound mind, memory and understanding when he executed the will. The respondents' counsel maintained that the finding that Jaimal knew and understood the contents of the will was a conclusive answer to this argument. But that is a misunderstanding of the judgment of the learned Chief Justice, who expressly says that he found it unnecessary to inquire into the state of Jaimal's memory on the day when the will was executed. A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations, and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid. In *Banks* v. *Goodfellow* (1), Cockburn C.J., delivering the judgment of the court, said, (2) " it is essential to the exercise of such a power " (scilicet, testamentary power) " that a testator shall under-" stand the nature of the act and its effects ; shall understand " the extent of the property of which he is disposing ; shall be " able to comprehend and appreciate the claims to which he " ought to give effect ; and, with a view to the latter object, " that no disorder of the mind shall poison his affections, " pervert his sense of right, or prevent the exercise of his " natural faculties—that no insane delusion shall influence his " will in disposing of his property and bring about a disposal " of it which, if the mind had been sound, would not have " been made." In *Harwood* v. *Baker* (3), the same principle had been stated, and it was observed that when a testator suffering from a debilitating disease had made a will excluding from his bounty his near relations in favour of his wife, it was necessary to determine whether he was at the time capable of recollecting who those relations were, of understanding their respective claims on his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. In *Sivewright* v. *Sivewright's Trustees* (1), Lord Haldane, with whom Lord Dunedin and Lord Buckmaster concurred, said, "The question whether there is such unsoundness of mind as renders it impossible in law to make "a testamentary disposition is one of degree. A testator "must be able to exercise a rational appreciation of what he "is doing. He must understand the nature of his act . . . . "If his act is the outcome of a delusion so irrational that it "is not to be taken as that of one having appreciated what he "was doing sufficiently to make his action in the particular "case that of a mind sane upon the question, the will cannot "stand. But, in that case, if the testator is not generally "insane, the will must be shown to have been the outcome "of the special delusion" (2). There is, of course, in the present case no question of insanity in the general or in the popular sense. But here the testator, who is proved to have been in the last stages of consumption and to have been reduced by disease to extreme weakness, has declared in his will that he had no relations anywhere, though if he had been of sound mind in the sense of the cases cited he must have known that the statement was untrue.

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(1) L. R. 5 Q. B. 549.

(2) Ibid. 565.

(3) 3 Moo. P. C. 282.

The testator, immediately before giving assent to the terms of the will, had said that he did not know whether he had relations elsewhere than in Fiji. This, however, does not better the case, but merely provides additional evidence of his weakness and vacillation of memory about his relations. There is evidence that at an earlier stage of his illness the testator had at one time remembered these nephews, in whose favour he had made a will as recently as in February, 1944, and had been under the mistaken belief that he had made by gift adequate provision for them. At other times he appears, according to some of the evidence, to have remembered that they took benefits under the wills he had made. The evidence as a whole shows that, though the Chief Justice may or may not have been warranted in saying that there was no good ground for inferring that Jaimal's memory was defective on March 31, there was a rapid degradation of his memory of his nephews till at last he reached the stage, when he executed his will, of denying their existence. It is relevant to note that he failed to employ the solicitor who had acted for him on previous occasions or even to ask him to send the previous wills or copies of them, for these are precautions which a testator of sound mind who deliberately intended to alter his will and to disinherit his near relations would naturally take. The result was that he obtained the services of a solicitor unacquainted with his family affairs and unable to judge whether he had the capacity to make a will with due regard for the claims of his nephews for whom he had till the closing days of his life always felt a warm affection. The opinion of Mr. Davidson and some other witnesses that Jaimal's mind was clear and logical and sound, though it might have had some value if the question had been one of his general sanity, is of no value in the present case where the question is whether there was a particular defect of memory caused by the weakness of disease. Witnesses were adduced to prove that the testator had, a week or so before his death, expressed to them his intention of leaving his property to Amirchand and Mehar. The evidence is of little relevance to the issue on which the appeal must turn. The learned Chief Justice does not mention this evidence, and their Lordships do not doubt that he had the fullest justification for ignoring it, and since it was pressed on their attention their Lordships think it proper to say that, after considering it, they deem it unworthy of credit and that its only effect is to deepen the suspicion which surrounds the will.

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(1) 1920 S. C. (H. L.) 63. (2) Ibid. 64.

Their Lordships are satisfied that the proper conclusion, disregarding all questions of onus, is that the will is the product of a man so enfeebled by disease as to be without sound mind or memory at the time of execution, and that the disposition of his property under it was the outcome of the delusion touching his nephews' existence. The will is therefore invalid. Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that judgment should be entered against the will of April 3, and that probate of the will of February 25, 1944, should be decreed in solemn form, and that the order for costs in the court below should be set aside, except so far as it applies to the executors of the will dated February 25, 1944. The respondents will pay the appellants' costs in the appeal.

Solicitors for appellants and respondents Nos. 3 to 6: *Hy. S. L. Polak & Co.*

Solicitors for respondents Nos. 1 and 2: *T. L. Wilson & Co.*

[HOUSE OF LORDS.]

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Apr. 24, 25, 28, 30;
May 1, 2;
July 28, 29.

WINTER GARDEN THEATRE (LONDON), LIMITED . . . . . APPELLANTS;

AND

MILLENNIUM PRODUCTIONS LIMITED RESPONDENTS.

Licence — Theatre — Licensor and licensee — Licence for six months —Option to continue for six months—Further option to continue— Power of licensor to determine licence.

The appellant company granted M. a licence to use their theatre, for producing stage plays, concerts or ballets, for six months from July 6, 1942, with an option to continue for a further six months at an increased rent. The licence contained the following provision: "On the expiration of the two periods of six months "before mentioned you are to have the option of further con"tinuing the licence of the theatre on the payment each week of a "flat rental of 300*l.* per week and you will give us one month's "notice of your intention of then terminating the licence." Provision was also made for the payment of four weeks' rent in advance. The licensors retained the management of the bars and cloakrooms. There was no express provision for the termination of the licence by the licensors. After the incorporation of the respondent company, M., with the consent of the appellant company, assigned to them the benefit of the licence. The options were duly exercised. On September 11, 1945, the appellant company served on the respondent company a notice purporting to determine the licence on October 13, 1945. In doing so they did not allege any breach of the conditions of the licence. The respondent company claimed a declaration that the licence was not revocable by the appellant company except on breach of its terms by the respondent company, or alternatively, that it was valid for a reasonable period after notice of revocation, which period had not expired.

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* *Present:* VISCOUNT SIMON, LORD PORTER, LORD SIMONDS, LORD UTHWATT and LORD MACDERMOTT.

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Held (1.) that the licence was not perpetual and that, on the appellants indicating their decision that the permission given thereby would be withdrawn, the respondents were to have a reasonable time to withdraw, after which they would become trespassers; (2.) that the respondents had failed to show that the time which the appellants were prepared to give them to withdraw was insufficient; (3.) that, accordingly, the notice given by the appellants was valid and effectual.

Wood v. *Leadbitter* (1845) 13 M. & W. 838 and *Hurst* v. *Picture Theatres, Ld.* [1915] 1 K. B. 1 considered.

Llanelly Ry. & Dock Co. v. *London & North Western Ry. Co.* (1875) L. R. 7 H. L. 550 distinguished.

Decision of the Court of Appeal (sub nom. *Millennium Productions, Ld.* v. *Winter Garden Theatre* (*London*), *Ld.*) [1946] W. N. 151; 115 L. J. (Ch.) 297, reversed.

APPEAL from the Court of Appeal (Lord Greene M.R., Somervell and Cohen L.JJ.).

The appellants owned the Winter Garden Theatre, Drury Lane, London. By letter, dated June 10, 1942, from the appellants to the Countess Mala de la Marr (hereinafter called " the " Countess ") they purported to grant a licence in the following terms: " Referring to our recent correspondence and con- " versation with you (acting for and on behalf of your company " Millennium, Ld., which we understand is in course of regis- " tration) below we set out the terms and conditions under " which our company grants to your company a licence for " the purpose of producing stage plays, concerts or ballets, " viz.: (1.) You take licence of the theatre for a period of six " months commencing on July 6, 1942, at a rental of 80*l*. " per week . . . . (2.) At the expiration of the six months " you are to have the option of continuing for a further period " of six months at a rental of 100*l*. per week plus 10 per cent. " of the gross weekly receipts in excess of 500*l*. such receipts to " be calculated after deduction of library discounts and enter- " tainment tax but it is understood and agreed that the maxi- " mum rental in any week, including this percentage shall be " 200*l*. Further should an armistice be signed between Germany " and Italy and Great Britain during the second period of your " licence the rent which shall become due and payable shall be " the flat rate of 200*l*. per week. On the expiration of the two " periods of six months before mentioned you are to have the " option of further continuing the licence of the theatre on the " payment each week of a flat rental of 300*l*. per week and you " will give us one month's notice of your intention of then

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" terminating the licence. You are to give us previous six " weeks' notice of your intention to exercise your option to " continue the licence for the further period of six months " and six weeks' notice of your intention to exercise your option " to continue thereafter. (3.) In addition to the rental you are " to be responsible for the payment of all expenses and all " outgoings in connexion with the running of the theatre . . . . " and you are to take over and engage the present staff . . . . " (4.) We retain the bars, cloakrooms and the right to sell " programmes . . . . but you are to participate to the extent " of 50 per cent. in the net profits and losses thereof . . . . " (5.) You are to conform to all the conditions under which the " theatre is licensed by the Lord Chamberlain and comply with " any government order or regulation . . . .You are to comply " with all reasonable requests of the company's resident " manager . . . . in so far as they affect the company's property or licence. (6.) You are not to enter into a sub-licence " of the theatre without consent of the company, but this " consent would not be unreasonably withheld provided a " mutual arrangement is made between us for our company " to participate in any profit on any sub-licence entered into " by you. It is further understood and agreed between " us that : (*a*) The possession of the theatre is retained by the " company but you have the unrestricted right over all the " rooms of the theatre with the exception of the office now used " as the registered office of the company and the rooms " covered by cl. 4 of this letter agreement. (*b*) You have the " right to charge whatever prices of admission you may think " advisable but you will not make any alterations or arrangements that will affect the status of the theatre as a West End " theatre . . . . (*c*) We shall be responsible for payment of all " rates, taxes, assessments and theatre and excise licence, also " keep the premises and boilers fully insured, but you will not " in any way make any structural alterations . . . . and on the " termination of your licence you are to leave the theatre in the " same state and condition as now exists, reasonable wear and " tear and damage by fire, storm, tempest and King's enemy " excepted and nothing herein contained shall render the " company liable for external and structural repairs . . . . " (*d*) These terms and conditions in no way whatsoever con" stitute a partnership." This was signed for and on behalf of the appellants and a counterpart was signed by the Countess " for and on behalf of ' Millennium, Ld. ' in course of regis-

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"tration." In a covering letter of the same date addressed to the Countess, the appellants stated that "it is a condition that "on the signing you let us have 320*l.* to be applied towards the "last four weeks' rent of the tenancy. On the exercising of the "option for the second six months this deposit will "be augmented to the extent of four weeks' rent on the basis "of 200*l.* per week, viz., 800*l.* and should you desire to continue "after the first twelve months further augmented to 1,200*l.*, "equivalent to the last four weeks on the rental basis of 300*l.* "per week." By an agreement in writing dated October 1, 1942, to which the appellants, the Countess and the respondents were parties the appellants consented to the assignment of the licence by the Countess to the respondents and also consented to the respondents granting a sub-licence to Tom Arnold and Jack Hylton. This agreement modified the provisions of that of June 10, 1942, in some respects but in terms provided by cl. 7 that upon the determination of the sub-licence the terms and conditions contained in it should cease to apply and the terms contained in the licence, dated June 10, 1942, should, upon such determination, have full force and effect and be binding on the parties. The Countess assigned the licence to the respondents on October 1, 1942, and the respondents granted a sub-licence for a year from September 7, 1942, to Jack Hylton and Tom Arnold (therein called "the "licensees") on October 2, 1942. By cl. 3 it was provided: "The licensees shall have six separate successive options of "extending this licence for a further period of one year (of "fifty-two weeks) under each option provided that . . . . . "(iii.) if at the end of any year when this licence would but for "this clause have determined there shall be presented at the "theatre a production the run of which in London shall not "have ended and the licensees shall desire to continue its "presentation at the theatre for the run of the production the "licensors will extend the period of this licence until the end of "the run of such production . . . . ." By cl. 4: "The "possession of the theatre and the effects is retained by the "licensors' landlords and whilst the same are being used by the "licensees no parting with the possession thereof shall be "deemed to have taken place by the licensors' landlords." By a letter, dated November 23, 1942, the respondents exercised their first option under cl. 2 of the agreement of June 10, 1942, and by a letter, dated April 24, 1943, they exercised their second option under cl. 2 to continue at the theatre after the expiration of the two fixed periods in July, 1943. The Arnold and Hylton sub-licence determined about September, 1943. On August 22, 1945, without any permission having been sought from the appellants, an agreement was made between the respondents (therein called "the theatre company") and Linnit & Dunfee, Ld. (therein called "the production "company") whereby the respondents agreed "to engage the "production company to produce at the Winter Garden Theatre, "Drury Lane, as from September 5, 1945, the play 'Young "'Mrs. Barrington' for a run which shall be determinable by "either party in accordance with part II of sch. II hereto ". . . ." The production company agreed that it would "(1.) Provide and be solely responsible for the salaries of the "complete cast . . . . and for the wages and salaries of all "persons employed or performing at the theatre and will "procure that the cast, artistes, production, scenery, dresses "and costumes and everything appertaining to the play as "presented at the theatre shall be suitable for a first-class West "End theatre . . . . (3.) During the run of the play at the "said theatre the gross receipts from the sale of seats for "performances of the said play shall be received and remain "under the control . . . . of the theatre company. (4.) The "theatre company shall be entitled to retain for its own use and "benefit out of the gross receipts from the sale of seats in "respect of each week after deducting entertainment tax when "payable and library discounts the proportion of such weekly "receipts set out in part I of sch. II hereto and the theatre "company agrees to pay to the production company the pro-"portion (being the balance) of such weekly receipts after "deducting entertainment tax when payable and library "discounts and any other payments due to be made by the "production company to the theatre company as hereinafter "provided . . . . (6.) The production company shall be "entitled to use such of the offices (other than the reserved "offices) in the theatre as the production company shall desire "for the purpose of running the play at the said theatre but for "no other purpose . . . . (8.) The production company ". . . . will punctually pay (other than in respect of the "reserved portions) for gas, electric current, heating and a "pro rata proportion of all fixed or standing charges and will "also pay one penny for each unit of current consumed at the "theatre during the continuance of this agreement for the "maintenance by the theatre company of the ordinary electric

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" globes in the theatre and pay the cost price of all electric " globes replaced on account of breakages. (9). The production " company will also take over . . . . the employees mentioned " in sch. I hereto . . . . and will also pay to the theatre " company on the Friday of each week an amount equal to the " aggregate amount of the salaries to the undermentioned staff " who throughout the continuance of this agreement remain " the servants of the theatre company, namely :

	" £	*s.*	*d.*
" Acting Manager	15	0	0
" A. Rouse : Box Office Manager	15	0	0
" D. M. Hall : Box Office First Assistant	8	0	0
" P. Rothwell : Box Office Second Assistant	3	10	0
" Box Office Third Assistant (to include pit " money-taker)			

" (10.) The production company . . . . will (*a*) Procure " that the play shall be announced on all billing and programmes as under :

" Sole Proprietors :
" Licensed by the Lord Chamberlain to William Cooper
" By arrangement with Mala de la Marr."

The theatre company agreed " to indemnify the production " company in respect of rent and other moneys payable by " the theatre company under the agreement under which they " hold the theatre." It was declared " that there are excepted " from use by the production company (*a*) the refreshment " rooms, bars, cellars, refreshment and storage places and offices " used in connexion therewith . . . . (*b*) the offices occupied " by the theatre company, (*c*) the following proprietory box " and/or seats " which were specified. In sch. I there was a list of employees. By sch. II, part I : " The gross receipts " (less entertainment tax and library discounts) shall be " divisible as follows : To the theatre company : The first " 350*l.* weekly of such receipts plus 17½ per cent. of all gross " receipts in excess of 1,750*l.* in any one week of eight per" formances . . . . To the production company : The balance " of such gross weekly box office receipts." By part II : " Should the gross weekly box office receipts (less entertain" ment tax and library discounts) amount to less than 1,400*l.* " per week for any two consecutive weeks . . . . then either " party hereto may give to the other party hereto two weeks'

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"notice in writing to determine this agreement . . . ." The programmes of the play were inscribed:

"By arrangement with Mala de la Marr
"Linnit & Dunfee, Ld.
"present
"Young Mrs. Barrington."

The agreement was not determinable by the respondents, in the events which happened, before January 5, 1946, when this was done. Meanwhile on September 11, 1945, the appellants gave the respondents notice "to vacate the Winter Garden "Theatre . . . . on October 13, 1945," but wrote a covering letter stating that if any other date was more convenient they would be prepared to give a new notice of revocation, provided that the date of revocation was not seriously delayed. On September 14, the respondents replied challenging the authority of the appellants to give a month's notice terminating the licence. They added that they were heavily committed at the theatre but did not suggest any other date for vacation. On September 20, the appellants answered that the licence was revocable but that a licensee was entitled to be given a reasonable time to remove himself and his possessions from the premises; they again asked the respondents to indicate whether a later date would suit them. On September 25, the respondents replied that the appellants had no right to determine the licence and that they were not prepared to vacate the theatre. The respondents issued a writ on October 9, commencing an action in the Chancery Division. By their statement of claim, which was delivered on November 16, 1945, they pleaded the agreements of June 10, 1942, October 1, 1942 and August 22, 1945, and claimed: "(1.) A declaration that the plaintiffs "[respondents] are entitled to a licence to use the theatre in "accordance with the terms of the said letters of June 10, 1942, "as varied by the said agreement of October 1, 1942, and "that such licence is not revocable by the defendants [appellants] except upon breach by the plaintiffs [respondents] "of such terms. (2.) Alternatively a declaration that such "licence as aforesaid if revocable at the option of the defendants "[appellants] is valid and effective until *after the expiration of a "reasonable notice or alternatively* after the expiration of a "reasonable period from the receipt by the plaintiffs [respon"dents] of notice of revocation and *that no reasonable notice has "been given or alternatively* that such period has not expired."

(The portions in italics were added by amendment at the hearing.) The appellants delivered their defence and counterclaim on November 27. By paras. 8 and 9 they pleaded: "(8.) The "plaintiffs' [respondents'] licence to use the said theatre was "by the notice of September 13, 1945, terminated as from that "date and after the lapse of a time reasonably sufficient for the "plaintiffs [respondents] to vacate the said theatre neither they "nor their servants or agents had any right to use the said "theatre or to enter or be thereon. A reasonable time for "such purposes would be one month. (9.) Alternatively the "defendants [appellants] were entitled to terminate the said "licence by reasonable notice and the said notice was reason"able and the said licence came to an end on October 13, "1945, and thereafter the plaintiffs [respondents] had no right "to use or enter or be upon the said theatre." The appellants claimed "(1.) A declaration that the plaintiffs' [respondents'] "licence to use the Winter Garden Theatre had been determined "and that after the lapse of a time reasonably sufficient to "vacate the said theatre they had no right to enter or be upon "or use the said theatre and that such time had elapsed; "(2.) An injunction to restrain the plaintiffs [respondents], "their servants or agents from using the Winter Garden Theatre ". . . . for the production of stage plays or any other purpose "and from entering or remaining or otherwise trespassing on "the said premises; (3.) Damages for trespass." The defence contained no plea that the agreement of August 22, 1945, was made in breach of the agreement by the respondents not to sub-licence the theatre. Roxburgh J. held that the licence was validly revoked. He also held that the respondents were not entitled to set up the agreement of August 22, 1945, in order to show that they had not been given a reasonable time to vacate the theatre, on the ground that that agreement was a sub-licence in breach of the provision in cl. 6 of the agreement of June 10, 1942. The Court of Appeal reversed this decision holding that the licence was irrevocable, finding for the respondents on their claim and dismissing the counterclaim. The appellants appealed to the House of Lords. (After the decision of Roxburgh J. the respondents commenced an action for rectification of the agreement of June 10, 1942, by adding at the appropriate part of cl. 2 the words "so long as you wish, "without power of revocation on our part." This action was now pending, the pleadings being complete.)

Sir Valentine Holmes K.C. and *Thomas Roche* for the appellants. A licence in relation to the use of land is a permit to the licensee to do something which would otherwise be a trespass by him. A mere licence not coupled with a grant of an interest in land is prima facie revocable at will, though it may be that notice of the date at which revocation is to take place must be given and the licensee must be allowed a reasonable time to wind up his activities, having regard to all the circumstances. All the authorities without exception support the proposition that a mere licence is prima facie revocable. The licensor may, however, bind himself by contract not to revoke the licence at all or for a limited period, but in the absence of such an agreement, either express or necessarily implied, he has the power and the right to revoke it. Further, a licence is essentially a personal grant. In the present case there is no express limitation of the licensors' right to revoke and no necessary implication of such a limitation. The agreement of June 10, 1942, is not framed on the lines of a grant of a perpetual licence which would be a most extraordinary bargain for commercial people to make, especially for a fixed unvarying payment. The provision therein as to the continuance of the licence after the expiration of the two periods of six months does not help the respondents. The absence of any mention of liability for internal repairs indicates that a prolonged duration was not contemplated. The transaction had to be carried through by means of a licence and not a lease because of the requirements of the law relating to theatres: see Theatres Act, 1843, ss. 2 and 3. [They referred to *Wood* v. *Leadbitter* (1); *Hurst* v. *Picture Theatres, Ld.* (2); *Cornish* v. *Stubbs* (3); *Llanelly Ry. & Dock Co.* v. *North-Western Ry. Co.* (4); *Great Northern Ry. Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (5); *Kerrison* v. *Smith* (6); *Wilson* v. *Tavener* (7); *Canadian Pacific Ry. Co.* v. *The King* (8); *Minister of Health* v. *Bellotti* (9); *Thompson* v. *Park* (10); *Aldin* v. *Latimer Clark, Muirhead & Co.* (11); *Butler* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (12), and *Lowe* v. *Adams* (13).] The next question is that of reasonable notice, viz., what is reasonable according to the current commercial circumstances of the parties. The only play that might affect it is "Young Mrs. Barrington," and the only reason the respondents allege for saying that the length of notice is insufficient is the existence of the contract of August 22, 1945, with Linnit & Dunfee, Ld., but on examination it appears that this was a sub-licence and a breach of cl. 6 of the agreement of June 10, 1942, since the appellants' consent was not obtained. The appellants have not waived this breach and so the agreement of 1945 cannot be taken into account to prolong the time to which the respondents are entitled for vacating the premises. In fact the notice of September 11, 1945, specified a reasonable future date for the termination of the licence. In the correspondence the respondents would not discuss the question of length of notice and they cannot now say that the notice given was not reasonable.

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(1) (1845) 13 M. & W. 838.
(2) [1915] 1 K. B. 1.
(3) (1870) L. R. 5 C. P. 334.
(4) (1875) L. R. 7 H. L. 550.
(5) (1851) 5 De G. & S. 138.
(6) [1897] 2 Q. B. 445.
(7) [1901] 1 Ch. 578.
(8) [1931] A. C. 414.
(9) [1944] K. B. 298.
(10) [1944] K. B. 408.
(11) [1894] 2 Ch. 437, 448.
(12) (1888) 21 Q. B. D. 207, 214.
(13) [1901] 2 Ch. 598.

Thomas Roche following. The respondents are really requiring the House of Lords to re-write the agreement of June 10, 1942, by inserting a provision that the appellants are not to have a power of revocation, but it is complete and perfectly workable as it stands, and the proper inference from the language is that the licence is not perpetual. The licence commences with a period of six months and afterwards provides for options to continue. This suggests a power to terminate by reasonable notice. The subject-matter of the agreement, the expressed purpose of the licence, the periodic payments, the retention of possession by the appellants, the stipulation as to the state in which the premises are to be left at the termination of the licence, all suggest that the licence is not perpetual.

Beyfus K.C. and *Albery* for the respondents. Leaving aside the case of licences coupled with an interest in land, which are irrelevant in the present case, licences may be either (*a*) gratuitous, or (*b*) contractual or for value. The former are all revocable at will, as in the case of guests in a private house, shoppers in a shop, visitors to the Temple. The law, however, gives the licensee sufficient time to work out the licence and, while he is doing so, it will not treat him as a trespasser, even though he is no longer there with the licensor's permission. Thus, he may remain on the premises long enough to remove his possessions. As to the second class of licences, either a licence may itself be the subject-matter of a contract or the subject-matter of a contract may imply the grant of a licence, as in the case of a contractor employed to decorate a house. When a licence is the subject-matter of a contract there is no prima facie view as to its duration or revocability.

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The contract must be construed in the light of its own terms with no leaning towards revocability or irrevocability. It must be read as a whole in the light of the ordinary principles of construction of contracts; there is no special principle of law with respect to the construction of contracts for the grant of licences. The contract and the licence are in effect one, as in the case of licences to enter a theatre or a racecourse. The principles governing this point are rightly stated in Chitty on Contracts (19th ed.), p. 119. Further, a "contract extending "over a period of time which on the face of the instrument is "indefinite and unlimited, places upon the party asserting that "the contract is not perpetual the burden of showing either "some expression in the contract itself, or something in the "nature of the contract, from which it is reasonably to be "implied that the contract was intended to be subject to "determination": Halsbury's Laws of England (2nd ed.), vol. 7, p. 181, para. 257. *Llanelly Ry. & Dock Co.* v. *London & North Western Ry. Co.* (1) supports this proposition; it lays down the proper general rule for the interpretation of contracts indefinite in point of time and it indicates that that principle is equally applicable when the subject-matter of the contract is a licence: see also *Walton Harvey, Ld.* v. *Walker & Homfrays, Ld.* (2). The onus is on the appellants in this case to show that this licence is revocable but all the pointers indicate that it is irrevocable. In construing the contract of June 10, 1942, the words "continue thereafter" in cl. 2 are capable of being read as "continue thereafter continuously." The clause means prima facie that the licence is to continue so long as the money stipulated is paid. There is no need to imply any words; if some stranger reading the contract before signature had pointed out that there was no provision as to duration, a reasonable man would have replied that it was unnecessary, because the intention of the parties was understood. The intention of the parties must be ascertained from the generality of all the documents and having regard to all the circumstances. In this case an extremely high rental was being asked. Moreover, persons producing ballets, plays and concerts must have security of tenure, first, because of the long previous preparation necessary, and, secondly, because the run of a play cannot be forecast. In particular, the licensees were put to considerable expense in providing war-time black-out. It is significant that, whereas it was stipulated that the licensees must give a

(1) L. R. 7 H. L. 550.

(2) [1931] 1 Ch. 145.

month's notice of termination (cl. 2), there was no provision for its termination by the licensors. The nature of the contract and the surrounding circumstances suggest that the licence was irrevocable. Alternatively, if the licence was revocable it could only be revoked on giving reasonable notice to the licensees, who were entitled to a reasonable time to wind up their commitments after the termination of the time given by the notice for surrender of the premises: see *Canadian Pacific Ry. Co.* v. *The King* (1). The decision in *Minister of Health* v. *Bellotti* (2) to the contrary effect was wrongly decided. No reasonable notice was given because at the time of the notice the licensees, to the knowledge of the licensors who had acquiesced, had a play running at the theatre. The production agreement, dated August 22, 1945, under which the play was being produced was not challenged by the licensors in their defence and counterclaim, and they did not plead that it constituted a breach of the licensees' obligation under the agreement of June 10, 1942, not to sub-licence the theatre without the consent of the licensors. Accordingly neither the judge nor the Court of Appeal nor the House of Lords is entitled to hold that it constituted such a breach. It was not a breach of the obligation because it was not a sub-licence. If the licensees had produced a play themselves they would have had to licence actors, dancers, musicians, scene shifters, stage-hands, box office assistants, cleaners, charwomen and members of the audience to go into the theatre, and that would not have constituted a breach of their undertaking. This followed inevitably from what was granted to the licensees. When the Pegasus Club is licensed to hold a ball in Lincoln's Inn Hall, they would not be in breach of an undertaking not to grant a sub-licence if they required contractors to send in caterers and a band. In this case the licensees remained in as full occupation of the theatre as a whole after the production agreement as before it. They engaged Linnit & Dunfee, Ld. as independent contractors. In so far as this was a sub-licence, it was a sub-licence to a person but not a sub-licence of a place. The licensees remained responsible for the rooms not necessary for the production of the play. A sub-licence of part of the theatre is not a sub-licence of the theatre: see *Russell* v. *Beecham* (3). Moreover, under the contract of June 10, 1942, the licence was expressed to be "for the purpose of producing stage plays, concerts or ballets."

(1) [1931] A. C. 414, 433.
(2) [1944] K. B. 298.
(3) [1924] 1 K. B. 525.

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The word "producing" must include "causing to be produced," since the three forms of entertainment require totally different talents, unlikely to be united in a single person. The meaning of the phrase is really "in order that these entertainments may "be produced under your auspices." The play which was being produced could not be suspended within the period of the notice given, which was accordingly not a reasonable notice. In any event a period reasonably sufficient for the licensees to vacate the theatre was not given. In all the circumstances not less than three months would be reasonable, for it does not follow because one month would be reasonable for the licensors that the same would be reasonable for the licensees. Further, the remedy of the respondents for wrongful revocation of the licence is not confined to damages: see *Hurst* v. *Picture Theatres, Ld.* (1). Finally, should the appeal succeed, the case ought to be remitted to the judge so that there may be liberty to apply to him, and the order of the House should be expressed to be without prejudice to the rights of the licensees in their action for rectification.

Albery following. After so long a discussion further argument might serve only to remind their Lordships of the Homeric lines (2):

ἄλλοι μέν ῥ' ἕζοντο, ἐρήτυθεν δὲ καθ' ἕδρας,
Θερσίτης δ' ἔτι μοῦνος ἀμετροεπὴς ἐκολῴα.

("The others sat down and were ranged in their places, but "Thersites alone still chattered like a jackdaw without restraint "of language.") If, therefore, their Lordships should revoke counsel's licence to address them he would only ask for a reasonable time to remove himself from the bar of the House. The contract of June 10, 1942, though ill-drawn, is not complicated or obscure. The difference of opinion in the courts below resulted from divergent views as to the general principle of law to be applied in the case of such a document. It has been suggested that it was an extraordinary bargain for commercial people to bind themselves in perpetuity. But the situation created was not really so very extraordinary. The appellants could still have sold the theatre and there would have remained a liability for damages for breach of the agreement if broken by the purchasers. Similar situations arise in conveyancing in connexion with such covenants to repair fences in perpetuity, when on a sale covenants of indemnity are taken. It was also suggested that it would be extraordinary

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(1) [1915] 1 K. B. 1.

(2) Iliad ii, 211.

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if the appellants bound themselves for ever for a fixed annual payment but the same considerations would apply if they had sold the theatre outright for 500,000*l.*, which, if invested in government securities, would have brought less than the amount of the rent actually reserved, and the money so received might still have depreciated in value. The salient point is that there is no express term in the document giving a power of revocation ; accordingly, if the licence is determinable, it must be because of some implied term. In the case of a licence to enter upon the land of another, granted for value, it is not the general rule of law that if the time for the duration of the licence is not defined and there are no expressions to the contrary, then, as a matter of course, the licence is revocable. Such a rule applies to certain contracts, e.g., of partnership, but not to a licence, unless, of course, it be a gratuitous licence. Accordingly, there is here no onus on the respondents to show that the licence was irrevocable. Each case must be considered on its own particular facts and the tribunal must decide between revocability and irrevocability on the ordinary principles of construction. Where there is no express provision for determination, such a term will only be implied when it must necessarily be implied : *Shirlaw* v. *Southern Foundries* (1926), *Ld.* (1). In this case the onus is on the appellants to show that the licence is not perpetual : see *Llanelly Ry. & Dock Co.* v. *London & North Western Ry. Co.* (2). The authorities do not establish that prima facie a licence for value is revocable. *Canadian Pacific Ry. Co.* v. *The King* (3) ; *Miller* v. *Watkins* (4) and *Aldin* v. *Latimer Clark, Muirhead & Co.* (5) were cases of licences which were revocable because they were gratuitous. *Wood* v. *Leadbitter* (6) turned on a point of pleading. The statement there (7) " that a licence under seal (provided it be a " mere licence) is as revocable as a licence made by parol " refers by the expression " mere licence " to licences given without consideration. *Cornish* v. *Stubbs* (8) turned merely on notice and the licence was construed by reference to the tenancy agreement. *Kerrison* v. *Smith* (9) was simply a case where the county court judge followed *Wood* v. *Leadbitter* (6). In *Wilson* v. *Tavener* (10) it was not argued that the arrangement was perpetual. It was analogous to an arrangement whereby A. might allow B. to park a car on his land for 1s. a time. In *Minister of Health* v. *Bellotti* (1) it was said that in such cases there was no cast-iron principle of law which was always to operate. The respondents rely on *Llanelly Ry. & Dock Co.* v. *London & North Western Ry.* (2), though such cases are, in their nature, rare. Here the parties have made a bargain and the court in construing it should not fetter itself beforehand with general rules. It should not start with a general rigid rule that because this is a licence it must be revocable. If a term is to be implied, it must be on the general principles of construction. When a term is to be implied it must be within the common contemplation of the parties. Here the fact that, under the contract creating the licence, an option to continue was given makes it plain that the licensees, to whom the option was given, were to have something that they would not otherwise have had. There is no half-way house between a perpetual licence and an immediately revocable licence. A power to revoke on reasonable notice would be void for uncertainty in the circumstances. There is no standard by which the court could find a measure of reasonableness beyond the conflicting commercial interests of the parties.

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(1) [1939] 2 K. B. 206, 227.
(2) L. R. 7 H. L. 550, 567.
(3) [1931] A. C. 414.
(4) (1874) L. R. 9 Q. B. 400.
(5) [1894] 2 Ch. 437.
(6) 13 M. & W. 838.
(7) Ibid. 845.
(8) L. R. 5 C. P. 334.
(9) [1897] 2 Q. B. 445.
(10) [1901] 1 Ch. 578, 581.

✓ *Sir Valentine Holmes K.C.* in reply. A licensor may either state that he is revoking the licence forthwith or after a certain period. After revocation the licensee may have a period of grace before he becomes a trespasser. During that time he may continue to do the thing for which the licence was granted as well as preparing to leave the premises. *Canadian Pacific Ry. Co.* v. *The King* (3) is hard to reconcile with the respondents' case. The appellants' submissions are not contrary to *Hurst* v. *Picture Theatres, Ld.* (4). As to notice, the respondents were formerly claiming that the licence was irrevocable; they cannot now contend that the notice given was not reasonable. Further, the agreement of August 22, 1945, was a breach of the agreement of June 10, 1942. The licence granted to the respondents was personal for limited purposes, and those to ~~who~~ whom it was actually granted were the persons to exercise it. A licence of a theatre is not like a lease. It does not hand over the building; it only gives permission to use it. The agreement of August 22, 1945 was not called a sub-licence but in all material respects it was, on the same footing as the sub-licence of October 2, 1942.

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(1) [1944] K. B. 298, 304.
(2) L. R. 7 H. L. 550.
(3) [1931] A. C. 414.
(4) [1915] 1 K. B. 1.

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It is immaterial that the respondents did not part with the whole premises. If A. licenses B. to use his house and B. lets C. use the kitchen, C. is a trespasser.

THE HOUSE took time for consideration.

July 28. VISCOUNT SIMON. My Lords, the appeal relates to a licence under which the respondents were permitted to use the Winter Garden Theatre, Drury Lane, which is the property of the appellants, for the purpose of producing stage plays, concerts or ballets, in return for a weekly payment which at the time when the appellants sought to terminate the licence amounted to 300*l.* per week. There was no express term in the licence providing that the appellants could revoke it and the principal question of the case is whether, as the respondents contend, and as the Court of Appeal decided, the respondents are entitled to continue their use of the theatre in perpetuity if they so desire, and continue the weekly payments, or whether, as the appellants contend, the licence is revocable by reasonable notice. It is to be noted that, although the expression " rent " or " rental " was used in the relevant documents, it is agreed between the parties (as is plainly the fact) that the respondents acquired no interest in land but were pure licensees for value, the consideration taking the form of a weekly payment. Such a licence is a contract, and this contract contains the express term that if the respondents, on proper notice, opt to continue the use of the theatre beyond the first twelve months, they may do so with the right of giving one month's notice of their intention of then terminating the licence. The licensors on the other hand are given by the documents no express right to terminate the licence at all : the question is, is such a right to be implied, and if so, on what terms ?

The effect of a licence by A. to permit B. to enter upon A.'s land or to use his premises for some purpose is in effect an authority which prevents B. from being regarded as a trespasser when he avails himself of the licence (*Thomas* v. *Sorrell* (1)). Such a licence may fall into one of various classes. It may be a purely gratuitous licence in return for which A. gets nothing at all, e.g., a licence to B. to walk across A.'s field. Such a gratuitous licence would plainly be revocable by notice given by A. to B. Even in that case, however, notice of revocation conveyed to B. when he was in the act of crossing A.'s field could not turn him into a trespasser until he was off the premises, but his future right of crossing would thereupon cease. There is another class of licences which may be called licences for value, in which B. gives consideration for the permission he obtains from A., and this last class may be further subdivided. In some cases the consideration may be given once for all, as for example by the payment of a capital sum or by conferring a single benefit at the beginning. The case of *Llanelly Ry. & Dock Co.* v. *London and North Western Ry. Co.* (1), to which I will refer later, is an example of this. In other cases, the consideration may take the form of a periodic payment, as is the case in the appeal we are now considering. There is yet a third variant of a licence for value which constantly occurs, as in the sale of a ticket to enter premises and witness a particular event, such as a ticket for a seat at a particular performance at a theatre or for entering private ground to witness a day's sport. In this last class of case, the implication of the arrangement, however it may be classified in law, plainly is that the ticket entitles the purchaser to enter and, if he behaves himself, to remain on the premises until the end of the event which he has paid his money to witness. Such, for example, was the situation which gave rise to the decision of the Court of Appeal in *Hurst* v. *Picture Theatres, Ld.* (2). I regard this case as rightly decided, and repudiate the view that a licensor who is paid for granting his licensee to enter premises in order to view a particular event, can nevertheless, although the licensee is behaving properly, terminate the licence before the event is over, turn the licensee out, and leave him to an action for the return of the price of his ticket. The licence in such a case is granted under contractual conditions, one of which is that a well-behaved licensee shall not be treated as a trespasser until the event which he has paid to see is over, and until he has reasonable time thereafter to depart, and in *Hurst* v. *Picture Theatres, Ld.* (2), where these rights were disregarded and the plaintiff was forced to leave prematurely substantial damages for assault and false imprisonment rightly resulted.

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(1) (1674) Vaugh. 330, 351.

Hurst

This brings up for reconsideration the oft-quoted and oft-considered decision of the Court of Exchequer in 1845 in *Wood* v. *Leadbitter* (3). I think that this decision can only be rightly understood by bearing in mind the state of the pleadings on which the decision depended. The old system of pleading was far more strict than the system now prevailing. The action was an action for the tort of assault and false imprisonment arising out of the circumstances that Wood had bought a ticket for admission to the grandstand at the Doncaster races but that while the races were going on the defendant, acting under the orders of Lord Eglintoun who was steward of the races, and must be treated as having sold Wood his ticket, turned the plaintiff out. The defendant's plea was that the plaintiff was on Lord Eglintoun's ground, to which the plaintiff filed a replication that he was there " by the leave and licence " of Lord Eglintoun " (1). There was a traverse to this replication and issue was joined on that traverse. Alderson B., at the beginning of his judgment, sets all this carefully out and the language of the replication is printed in italics in the report. Kennedy L.J., pointed out in *Hurst* v. *Picture Theatres, Ld.* (2) that in *Wood* v. *Leadbitter* (3) " it was not there suggested by the " plaintiff ' My right to remain is not merely by leave and " ' licence of Lord Eglintoun ; I have an implied contract that " ' I should be there and that contract is not subject to " ' revocation '," and went on " Therefore, as I say, one must " deal with that case upon the pleading, and upon that pleading " the judgment of the court cannot be put more specifically " or more correctly than in the passage I have quoted from the " headnote." The passage in the headnote referred to by the Lord Justice (4) is as follows : " A right to come and remain for " a certain time on the land of another can be granted only by " deed ; and a parol licence to do so, though money be paid for " it, is revocable at any time, and without paying back the " money." It seems plain, therefore, that the only issue to be decided in *Wood* v. *Leadbitter* (3) was whether the plaintiff, when he was forcibly removed from Lord Eglintoun's land, continued to have the leave of Lord Eglintoun to be there ; and he had not this leave because it had been withdrawn. On the pleadings in that case, the question was not open whether the effect of the contract was not to preserve the plaintiff from being treated as a trespasser until the races were over. Until the Common Law Procedure Act of 1852 permitted joinder of different causes of action in the same suit, a plaintiff in the position of Wood had to sue either in tort (as he did) or in assumpsit. In *Kerrison* v. *Smith* (5) Collins J. said of *Wood* v. *Leadbitter* (3) " it was conceded that the grantor has a right

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(1) L. R. 7 H. L. 550.

(2) [1915] 1 K. B. 1.

(3) 13 M. & W. 838.

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(1) 13 M. & W. 838, 839.

(2) [1915] 1 K. B. 1, 13.

(3) 13 M. & W. 838.

(4) [1915] 1. K. B. 1, 12.

(5) [1897] 2 Q. B. 445, 448.

"to revoke a licence but the point set up by the plaintiff, that "there was a contract, for the breach of which the plaintiff "was entitled to recover damages, was never properly dealt "with." It does not seem necessary to discuss, now that we are more than a hundred years from the decision, whether if the Judicature Acts had then been passed, the Court of Exchequer could have protected Wood from what was an injustice; the instances given by the judges who were in a majority in *Hurst's* case (1) show how manifest the injustice is. Wood's position really was that Lord Eglintoun had agreed with him for reward, not to treat him as a trespasser till the races were over, and till he had a reasonable time after that to withdraw, but this was not the issue directly raised by the pleadings. It is enough to say that, at any rate since the fusion of law and equity, no court in this country would refuse to a plaintiff in Wood's situation the remedy for which he asked, and the case, in my opinion, should no longer be regarded as an authority.

I had reached this point in drafting my opinion when I had the advantage of reading in print the opinion prepared by my noble and learned friend, Lord MacDermott, in this appeal. He has so precisely and clearly expressed the view which I had formed on the case before us that it becomes unnecessary to deal independently with the application of the principles I have endeavoured to formulate to the matter in hand. I agree with him entirely that the decision of this House in *Llanelly Ry. & Dock Co.* v. *London & North Western Ry.* (2) does not assist the present appellants, for the reasons he states. On the other hand, I accept his conclusion that when the clauses of the present licence are carefully studied, the proper inference from the language used is that the licence was not perpetual but that the intention of the parties, to be inferred from the document, though not expressly stated, was that, upon the appellants' indicating their decision that the permission given by the licence would be withdrawn, the respondents were to have a reasonable time to withdraw after which they would become trespassers. There is, in my opinion, no reason at all for saying that the only alternative to a perpetual licence is an instant termination of the respondents' right without any period of notice at all.

I entirely agree with the analysis to which my noble and learned friend, Lord MacDermott, has subjected the arrangement made between the respondents and Linnit & Dunfee, Ld. of August 22, 1945, from which it follows that this agreement

(1) [1915] 1 K. B. 1. (2) L. R. 7 H. L. 550.

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was really a sub-licence entered into without the appellants' consent, thus constituting a breach of cl. 6 of the letter of June 10, 1942. Consequently, the respondents are precluded from relying on it in support of their plea that, if the licence were revocable, reasonable notice had not been given. The result is, as Lord MacDermott points out, that the respondents failed to show that the time which the appellants were prepared to give them to withdraw was insufficient ; the notice given by the appellants must be considered valid and effectual. I move that the appeal be allowed.

LORD PORTER. My Lords, on June 10, 1942, the appellants granted to the Countess de la Marr a licence of the Winter Garden Theatre for the purpose of producing stage plays, concerts or ballets. As I understand, the terms of this licence were meant to be a preliminary step towards establishing a contractual relationship between the appellants and the respondent company which had not then been registered. It was, however, formed shortly afterwards and on October 1, 1942, a further agreement was entered into between the appellants, the Countess, and the respondents, whereby she was authorized to assign her licence to the respondents and they in their turn were permitted to grant a sub-licence to Messrs. Arnold and Hylton for a period which by a series of options granted to those gentlemen might extend for seven years or even longer if a successful play were running at the expiry of the last optional period. The sub-licence to Messrs. Arnold and Hylton in fact expired long before any date material for your Lordships' consideration, and is, I think, only of importance as indicating that the appellants were at one time contemplating the possible continuance of the respondents' licence for seven years and upwards. Two further documents are of importance, viz. : An assignment of the licence by the Countess to the respondents on October 1, 1942, and an agreement of August 22, 1945, whereby the respondents purported to engage Linnit & Dunfee, Ld., to produce a play entitled " Young Mrs. Barrington " at the theatre. A question whether this agreement constituted an unauthorized licence of the theatre to Linnit & Dunfee will have to be considered later, but cannot be solved until the terms of the original licence and the terms of the (alleged) unauthorized licence are examined.

Before these matters are considered your Lordships must, I think, decide what are the principles in the light of which a licence to enter into and carry out activities upon land has to be construed. Upon this subject there is a wide divergence of view, the appellants contending that prima facie a licence is revocable at will, though it may be that due notice of the date at which the revocation is to take place must be given and though the licensee must at least be given reasonable time to wind up his activities having regard to all the circumstances of the case. They add that this view is, of course, not inconsistent with the existence of a term in the licence whether express or implicit, making it irrevocable altogether or for a named period. The Court of Appeal, however, has held and the respondents maintain that no such principle is to be applied, even prima facie, in construing a licence. That contract, they say, must be construed in the light of its own terms and with no leaning towards revocability or irrevocability.

My Lords, there are very few, if any, contracts which can be construed without taking into consideration a long background of gradual development and the implication of customary provisions, and I do not think that the meaning of a licence can be reached by considering the matter, as it were, in the air: its incidents have a long history behind them. What is the effect of that history or indeed what it is may well be in dispute, but whatever it is I do not think it can be neglected. The general proposition as to the rights conferred by a licence is to be found as early as 1673 in the judgment of Vaughan C.J. in *Thomas* v. *Sorrel* (1), in the words "a dispensation or licence "properly passeth no interest nor alters or transfers property "in anything, but only makes an action lawful, which without "it had been unlawful." This statement was quoted in *Wood* v. *Leadbitter* (2) by Alderson B. delivering the judgment of the court, and for the proposition that every licence is and must be revocable so long as it is a mere licence he refers to Brooke's Abridgment, Book II sub-tit. "Licences" para. 15, to the judgment of Doderidge J. in *Webb* v. *Paternoster* (3); to *Rex* v. *Horndon-on-the-Hill Inhabitants* (4); and to *Hewlins* v. *Shippam* (5).

It has been suggested that the decision in *Wood* v. *Leadbitter* (6) turned merely on the pleadings and decided only that a right to enter and remain on land though for no more than a limited period required a deed to make it effective. I cannot

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(1) Vaugh. 330, 351.
(2) 13 M. & W. 838, 844.
(3) (1619) 2 Roll. R. 143, 152.
(4) (1816) 4 M. & S. 562.
(5) (1826) 5 B. & C. 221.
(6) 13 M. & W. 838.

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think so. It is true that the decision ultimately turned on this point and equally true that the contention might not be good after the passing of the Judicature Act, enjoining common law courts to take into consideration the doctrines of equity. But as I read the case it is assumed that a licence is prima facie revocable. Throughout the whole of the judgment this point is stressed. Indeed Alderson B. says (1): "It may further "be observed, that a licence under seal (provided it be a mere "licence) is as revocable as a licence by parol." It was said on behalf of the respondents that this principle applied only to licences given without consideration and that the phrase "mere licence" was used in order to exclude licences given for a consideration. If the contention that licences given for a consideration are not revocable were confined to a limited licence to do a particular act or series of acts, I do not think I should disagree provided the performance of a particular act had been actually begun. So limited the proposition does not conflict with the view that normally a licence is revocable, but if applied generally it does, as I think, conflict with the principles laid down in *Wood* v. *Leadbitter* (2), and in particular with the statement that a licence under seal (which does not require consideration) is as revocable as a parol one. In *Wood* v. *Leadbitter* (2) the licence was for a limited purpose and for a limited time and for valuable consideration. It may well be that now that common law and chancery remedies can be administered by any branch of the High Court, a different decision would be given, but even if that be conceded it does not seem to me to have any bearing on the case now presented to your Lordships. It is one thing to say that a limited and temporal licence remains in force until the particular object for which it is given is fulfilled or the definite period of time has elapsed, it is quite a different matter to allege that a licence once given in general terms can never be terminated. To my mind the whole historical development of the law is against such a contention. *Cornish* v. *Stubbs* (3), *Mellor* v. *Watkins* (4) *Kerrison* v. *Smith* (5), *Wilson* v. *Tavener* (6), *Canadian Pacific Ry. Co.* v. *The King* (7), *Minister of Health* v. *Bellotti* (8), are all against it and even *Hurst* v. *Picture Theatres, Ld.* (9) is not antagonistic.

(1) 13 M. & W. 838, 845.
(2) Ibid. 838.
(3) L. R. 5 C. P. 334.
(4) L. R. 9 Q. B. 400.
(5) [1897] 2 Q. B. 445.
(6) [1901] 1 Ch. 578.
(7) [1931] A. C. 414.
(8) [1944] K. B. 298.
(9) [1915] 1 K. B. 1.

The respondents, however, relied in particular on *Llanelly Ry. & Dock Co.* v. *London & North Western Ry. Co.* (1). Undoubtedly in that case running powers over their line given by one railway company to another were held to be irrevocable, but they formed part of a general agreement under which a large sum was lent, and formed part of the consideration for the loan. In any case running powers are in a class by themselves involving special arrangements, preparations and expenditure, which may well influence the construction of an agreement under which they are granted. The actual decision was that all the provisions of the agreement showed that it was a permanent and not a terminable one. It is true that Lord Selborne said (2) that "an agreement de futuro, extending over "a tract of time which, on the face of the instrument, is in-"definite and unlimited, must (in general) throw upon anyone "alleging that it is not perpetual, the burden of proving that "allegation either from the nature of the subject or from some "rule of law applicable thereto." Whether such a proposition is too widely stated, though in general it may be true, is not a matter which, in my opinion, it is material to decide. The other members of the House gave their decision upon the construction of the document itself and in any case qualified it by bringing to the inquiry a consideration of the nature of the subject-matter involved.

The rule of law applicable to the licence granted to the respondents in the present case, is, I think, that prima facie licences are revocable: the circumstances of the case are (1.) that this was a licence to use a theatre and (2.) are to be found in the terms of the document itself. Judging from the last consideration alone I should think it revocable. The licence is for the purpose of producing stage plays, concerts and ballets and starts with options to retain the licence for two successive periods of six months each. These provisions are succeeded by an option of further continuing the licence. Speaking for myself I should not, unless compelled, construe such a document as granting a perpetual licence. If it were a tenancy I should interpret it as requiring no more than reasonable notice, and indeed, as rent is payable weekly, it might require only a week's notice. I cannot think that the rights acquired by means of a licence exceed those which a tenancy would give. But it is said (1.) the licensees were put to considerable expense in war time in providing black-out material, and (2.) the licensees have to give a month's notice to terminate the licence whereas no provision for its termination by the licensors is to be found. As to the first objection the answer, as I think, is that the respondents were granted at least a year certain and a possibility of seven years enjoyment; and as to the second that, if my view of the law be right, the licensees are entitled to a reasonable time after notice to put an end to their commitments, whereas the licensors would have no protection against the licensees walking out at any moment and, therefore, require some notice of an intention to do so. Primarily, of course, the question whether the respondents' licence is revocable or irrevocable must depend on the language of the document of June 10, 1942, and from that contract I cannot find grounds for supposing it to be irrevocable. Apart from the circumstances already mentioned, the retention of the bars and cloak rooms, the right on the part of the appellants to sell programmes, etc., their retention of the possession of the theatre and their acceptance of responsibility for payment of all rates, taxes, assesments and theatre and excise licences are not obligations which one would expect the grantor of a perpetual licence to undertake. Much less would they render themselves liable for external and structural repairs, external painting and decoration and repairs to roof and main drainage. I have not forgotten that the licence was granted and accepted in war time and at a substantial and increasing rent. Such a consideration may have some weight in a case where the construction of a document is doubtful. In the circumstances of the present case it cannot, I think, influence the decision.

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(1) (1873) L. R. 8 Ch. 942; (1875) L. R. 7 H. L. 550.

(2) L. R. 7 H. L. 550, 567.

There remains the subordinate question whether the appellants did not bring their action too soon. On this issue the respondents put forward two contentions (1.) that the month's notice given by the letter of September 11, 1945, is too short, (2.) that in the case of a licence they are entitled to a reasonable time to wind up their commitments after the termination of the time given by the notice for surrender of the premises. My Lords, speaking for myself on an occasion when I do not think it necessary to come to a final conclusion on the matter, I take the provisional view that a licence is prima facie terminable at once after notice to determine has been given, but that the licensee must be given a reasonable time to vacate the premises and what is a reasonable time must depend upon all the circumstances of the case. In the case of a theatre, it might even extend to the run of a play, if no suitable alternative premises could be found. But in the present instance I do not think a question of this kind which may give rise to a marked difference of view calls for decision. Whether the submission be that notice to determine a licence is required and a month was too short in the circumstances, or that a month's notice having been given the respondents were entitled to a reasonable time to dispose of their commitments and that no sufficient time had been given when the appellants delivered their counter claim for a declaration and injunction on November 27, 1945, the issue is still the same: Was a month's notice sufficient and was a reasonable time for vacating the theatre given, whether that time is to count from the date of giving the notice or from the time at which possession was demanded?

In either case the respondents sought to rely on the agreement which they had entered into with Linnit & Dunfee, Ld., and upon it alone as a circumstance to be taken into consideration in determining the time which should be given for vacating the premises. If that agreement was permissible under the terms of the licence of June 10, 1942, the time given was undoubtedly too short. For the appellants however, it is said, and Roxburgh J. who alone dealt with the matter decided that it was a sub-licence, and void under cl. 6 of that document, as it had not been authorized by the grantors. The material portion of that clause reads as follows " You are not to " enter into a sub-licence of the theatre without consent of the " company, but this consent would not be unreasonably withheld " provided a mutual arrangement is made between us for our " company to participate in any profit on any sub-licence to " be entered into by you." In fact no permission to sub-licence was asked, nor was any agreement made for participation in the profit arising from the agreement between the respondents and Linnit & Dunfee, Ld. That agreement had not been authorized and if it was a sub-licence was entered into in defiance of cl. 6 and cannot be relied upon as prolonging the time to which the respondents were entitled before vacating the premises. Is it then a sub-licence? I think it is. The learned judge who tried the case has gone through the agreement clause by clause and it is not necessary for me to repeat his analysis. I think it is sufficient to say that the original licence of June 10, 1942, authorized the use of so much of the theatre as was required for the production of stage plays, concerts or ballets, reserving only an office, the right to bars and cloakrooms and some general control. Similarly, Linnit & Dunfee, Ld. obtained the right to use so much of the theatre as they required to produce a particular play with not dissimilar reservations. As the learned judge observed (1), there is only one thing in the latter agreement which supports the contention of the respondents, viz., the phrase " The theatre company agrees " to engage the production company to produce," and in his opinion those words could not prevail against the substance of the agreement as a whole. With this view I concur. I also take the same view as Roxburgh J. in thinking that there is no sufficient evidence to prove that the appellants knew of and acquiesced in the impugned agreement. A knowledge that the programmes contained the words " By arrangement with " Mala de la Marr, Linnit & Dunfee, present 'Young " 'Mrs. Barrington' " seems to me quite insufficient for that purpose. On all points therefore I find myself in agreement with the learned judge who tried the case and would allow the appeal and restore his judgment.

LORD UTHWATT. My Lords, the letter of June 10, 1942, gave to the licensees the option—which they duly exercised— " of further continuing the licence of the theatre on the pay- " ment each week of a flat rental of 300*l.* per week and you " (i.e., the licensees) will give us one month's notice of your " intention of then termininating the licence." The letter did not contain any other provision in terms directed to the period for which the extended licence was to continue.

In my opinion a right to continue without more does not mean anything except a right to continue for a period which is left at large. The language of the letter is consistent with the implication of the term for which the licensees contend, namely, that the licence was to continue for ever subject only to the right of determination given to them. But unless that term can be implied—it is in effect a stipulation that the licensors will not revoke the licence—it is to my mind an inevitable consequence that the licensors might determine the licence by notice given at any time.

The question whether any such term can be properly implied is purely a question of the construction of the contract. Upon that the subject-matter of the bargain, viz., the right to the exclusive use for defined purposes of practically the whole theatre, possession being retained by the licensors; the presence in the contract of obligations incumbent on the licensees the non-performance of which might subject the licensors to serious loss, coupled with the absence of any power of determination in the licensors in the event of breaches by the licensees of their obligations ; and the personal relation between the licensors and licensees arising out of the retention of parts of the theatre for use by the licensors appear to me to negative the propriety of making the implication suggested. If the implication is to be made, it can only be made by stressing the contrast between the presence in the licence of a power to determine given to the licensees and the absence of any such power in favour of the licensors. Is it a proper inference from this contrast that the true intendment of the bargain was that the licence was to be determinable only at the wish of the licensees ? In my opinion it is not. If the provision giving the licensees power to determine were absent, it might be inferred from the reversation of a weekly rent that the licensees could determine the licence by a week's notice. I read the provision requiring a month's notice as in substance only a proviso directed to securing a notice longer than that thought to be inherent in a transaction essentially determinable, the choice of a month marching with the stipulation contained in the accompanying letter of even date as to maintenance in the hands of the licensors of four weeks' rent. I cannot read the provision as marking out the only way in which, consistently with performance of the bargain, the licence might be brought to an end. I am unable therefore to imply a term providing for continuance of the licence for ever. The consequence is, in my opinion, that the licensors might determine by notice given at any time.

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(1) (1946) 115 L. J. (Ch.) 185, 191.

The next question is whether the notice given must be a reasonable notice or whether it may be a notice operating at once to determine the licence, the licensees in that event having a reasonable time within which to vacate the theatre. In my opinion it is the former. I cannot think that any other notice would reflect the intention of reasonable men in the position of the licensors and licensees in the present case. No reasonable man would in that connexion deny the relevance of the general proposition that he who sows should be allowed to reap. To my mind working effect to that proposition is best given in the present case by requiring that the licence should determine when the fruits have been reaped—i.e., at the expiration of a notice the length of which is determined by the commitments of the licensees as they stood under the contract at the date of the notice rather than by permitting an immediate determination of the licence on the giving of the notice coupled with a right in the licensees to work out the position that existed at the date of the notice.

The latter alternative would resemble the exceptional position of a tenant of land expressed to hold at will whose tenancy has been determined by an immediate notice. He, under the law relating to emblements, is entitled, paying no rent after his tenancy has determined, to enter and gather his crops. Presumably in the present case, were notice other than a reasonable notice sufficient and given, the licensees working out their position would not, in respect of the period after the determination of the licence, be under any obligation to pay rent. That is not a commercial proposition. The former alternative that a reasonable notice is necessary accords with the law that a reasonable notice is necessary to determine a tenancy of land held under a general occupation at a rent, where the tenancy is not expressly a tenancy at will: (*Doe d. Martin* v. *Watts* (1).) Where rent is reserved by the year the rule has long ago been rigidly fixed that a reasonable notice is a half year's notice expiring on the last day of the year of the tenancy (cf. 15 H. 8, 15*b*) and similar rules defining the application of the principle have been laid down as respects general occupation of land at a monthly or weekly rent. But these are rules only. The assertion of the principle and an example of its application will be found in *Lowe* v. *Adams* (2). The licence here very closely resembles a tenancy under a general occupation and I would, as respects the nature of the right of the licensors to determine it, apply the principle which governs the right to determine such a tenancy. In my opinion therefore, a reasonable notice was necessary in order to determine the licence.

In a case such as the present the question what is or is not a reasonable notice to quit cannot be determined by reference only to the nature of the user authorized by the licence. It is necessary to take into account the actual user. Those commitments of the licensees which exist at the date of the notice and which are consistent with legitimate user of the rights granted by the licence must be taken into consideration. That may be thought to subject the licensors to practical difficulties in determining the proper length of the notice to be given by them:

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(1) (1797) 7 T. R. 83.

(2) [1901] 2 Ch. 598.

but, in my opinion, the licensors are entitled to require from the licensees—who alone may be assumed to know all the relevant facts—such information as is necessary to enable them to form an opinion as to the proper length of a reasonable notice. A correct analysis of the licensors' position is that they have the right to give notice ; but are subject to the obligation to give a reasonable notice. On that footing the licensees are in my opinion under an implied obligation upon request to give to the licensors such information as is requisite for the proper performance of the licensors' obligation (cf. *Mackay* v. *Dick* (1)). The requirement of a reasonable notice does not, therefore, create an impracticable position.

The remaining question is whether the notice given by the licensors was, in fact, a reasonable notice. The notice given was a calendar month's notice. It was, therefore, notice for a date later than the expiry of the period for which the licensors had rent in hand. No difficulty therefore arises on that head. The only point taken was that, consistently with the licence, " Young Mrs. Barrington " was being produced at the theatre by the licensees and that the arrangements for its production could not be terminated before the calendar month expired. The month was on that ground said to be too short. The contention of the licensors was that the play was not being produced by the licensees but was being produced by Linnit & Dunfee, Ld. (the production company) under an agreement which involved a sub-licence of the theatre, and that the agreement so made was a breach of the provisio contained in the licence " not to enter into a sub-licence of the theatre " without the consent of the licensors. If this construction of the agreement with Linnit & Dunfee, Ld., is correct, there is no doubt that the demands on the theatre for the purposes of the play should be disregarded.

The agreement opens with a provision that the licensees agree to engage " the production company to produce . . . . the " play ' Young Mrs. Barrington ' " for a specified term. The form of words used to describe the arrangements made does not determine its character. The terms of the whole agreement must be taken into account. Under those terms the licensees had no control over the casting of their play, the salaries paid, or the production of the play. They were given no voice in fixing the tariff. Employees, other than the acting manager and box office employees, were taken over by the production company but the salaries of the excepted employees were to be recouped to the licensees. The production company were to pay the running charges for light and gas and heat. Not even the electric globes were forgotten. Broken globes were to be paid for and a fixed payment per unit of electricity consumed was to be made in respect of the maintenance of electric globes. On the other hand, the licensees remained in charge of the box office but they were bound to account to the production company for the gross receipts less the sums properly retainable by them. That provision is only machinery. The licensees were to be responsible for the rent payable to the licensors, and certain small accommodation and a few boxes and seats were reserved to the licensees. The financial arrangement was a division of gross receipts under which the licensees received the first 330*l.* weekly and 17½ per cent. of the gross receipts in excess of 1,750*l.* The production company received the balance of the gross receipts. The outstanding features are that the licensees had no control over production or expenses and had no interest in net profits.

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(1) (1881) 6 App. Cas. 251, 263.

In these circumstances it is, to my mind, merely toying with words to say that the play was being produced for the licensees. The control of the theatre was for all the purposes of a particular play handed over to the production company and there was, therefore, in truth, a sub-licence of the theatre. The exceptions from the subject-matter handed over are immaterial.

My view as to the construction of the agreement renders it unnecessary to consider whether *Hurst* v. *Picture Theatres, Ld.* (1), was rightly decided, or to express any concluded opinion on the question of the remedies now open in every court to a bare licensee who claims that the licensor has in breach of his bargain affected to revoke it. I merely confess my present inability to see any answer to the propositions of law stated by the Master of the Rolls in his judgment in the case under appeal. The settled practice of the courts of equity is to do what they can by an injunction to preserve the sanctity of a bargain. To my mind, as at present advised, a licensee who has refused to accept the wrongful repudiation of the bargain which is involved in an unauthorized revocation of the licence is as much entitled to the protection of an injunction as a licensee who has not received any notice of revocation; and, if the remedy of injunction is properly available in the latter case against unauthorized interference by the licensor, it is also available in

(1) [1915] 1 K. B. 1.

the former case. In a court of equity, wrongful acts are no passport to favour.

I would allow the appeal.

LORD MACDERMOTT. My Lords, the first question in this appeal is whether the licence granted by the appellants was, according to the contract creating it, revocable when the present dispute arose. The answer depends, in my view solely, on the true construction of the letters of June 10, 1942, as ascertained in conformity with the ordinary principles applicable to the interpretation of written instruments. On this aspect of the case the respondents relied on the decision of this House in *Llanelly Ry. & Dock Co.* v. *London & North Western Ry. Co.* (1), and, in particular, on the passage in Lord Selborne's speech which reads (2): " An agreement de futuro, extending over a " tract of time which, on the face of the instrument, is in- " definite and unlimited, must (in general) throw upon any " one alleging that it is not perpetual, the burden of proving " that allegation, either from the nature of the subject, or from " some rule of law applicable thereto." My Lords, when the facts of that case are examined it is plain that the contract for running powers which was there held to be permanent in character had little in common with the contract between the parties to this appeal, save that in neither instance was express provision made for revocation by the licensors. In the *Llanelly* case (1) the agreement not only contained terms which indicated the construction adopted but, as a perpetual arrangement, it conferred rights of a kind contemplated by the railway legislation then in force—a circumstance which Lord Cairns L.C. obviously regarded as important, for he observed (3) that: " as those other terms, secured by Act of Parliament, would " have been continuing, so this agreement, carrying more " favourable terms, appears to me in its nature to be a con- " tinuing agreement." In the present case there is no such statutory background and a close scrutiny of what the parties have agreed has failed to reveal any stipulation which I can regard as manifesting an intention that the licence was to go on for ever if the licensees so desired. No doubt the dictum of Lord Selborne, which I have quoted above, is in wide terms. But it is not expressed as a universal rule of construction (as the cautionary words " in general " show) and I doubt very much if it was intended to have any applicability to circumstances such as those now under consideration. If it has I would, for my part, be prepared to arrive at the same conclusion as if it had not, for, even if an onus rests on the appellants in this matter, the whole tenor of the letters of June 10, 1942, and the nature of their subject-matter, seem to me to negative, quite definitely, the idea of irrevocability so strongly urged on behalf of the respondents. The expressed purpose of the licence, the periodic payments, the complete retention of possession by the appellants, the various stipulations which give each of the parties a close and lively interest in the conduct and integrity of the other while the licence lasts and, not least, the provisions of para. (*c*) of cl. 6 of the letter agreement as to the maintenance of the premises and the state and condition in which they are to be left on the termination of the licence, all point to this conclusion and away from the notion that the permission of the appellants was perpetual. For these reasons, which I need not elaborate, I am of opinion that on the construction of this contract the licence was revocable during the period material to this appeal.

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(1) L. R. 7 H. L. 550.

(2) Ibid. 567.

(3) Ibid. 559.

But if so, how could revocation be effected ? Like the first, this question involves the construction of the contract and it also requires consideration as to what term, if any, should be implied therein to give effect to the intention of the parties. My Lords, the profusion and diversity of licences and the freedom of contract regarding them are such as to discourage any unnecessary formulation of general propositions on the subject. But it is, I think, safe, as well as desirable for the decision of this case, to say that one who remains on the land of another after his licence to use it has terminated will not be considered a trespasser before he has had a reasonable time in which to vacate the premises. That is well settled, though the assessment of what is reasonable may depend on a great variety of factors and cause considerable difficulty in particular instances. This period of grace can, of course, be the subject of agreement, but it exists for gratuitous as well as for contractual licensees and, on that account, must, I think, be generally ascribed to a rule of law rather than to an implied stipulation. For that reason it need not be read into this contract. It has, however, a bearing on the question which I am now discussing. It supervenes *after* the licence has terminated. Its purpose is to enable the former licensee to adjust himself to the new situation by vacating the premises. Measured reasonably and fairly it will often provide sufficiently for the consequences of the licensor's change of will. But its object is not to prolong the user sanctioned by the licence merely for the benefit and convenience of the licensee for, ex hypothesi, the licence has ceased; and where, as for example in cases of a specialized user involving obligations to third parties or the public, the circumstances or the contract are such as to show that an immediate cessation of the authorized use or activity was not contemplated or intended, the rule of law to which I have referred may well, and notwithstanding a liberal measurement of its reasonable period, fall short of meeting the just requirements of the position.

Turning to the present case, the question then arises whether the true intendment of the contract was such as to permit an immediate withdrawal of the licence. My Lords, on that I think it is as clear that the parties did not contemplate an immediate, out-of-hand, revocation as it is that they did not intend a perpetual arrangement. What was granted was a licence to use the theatre "for the purpose of producing stage plays, "concerts or ballets." That purpose, as everyone knows, connotes a wide range of activity and a highly specialized user of the premises. It involves considerable expenditure and a host of contractual relationships with those who provide and those who seek the entertainment offered. Whatever the legal attributes of a bare and unqualified licence may be, the expressed object of this licence makes it hard to believe that either of the parties ever intended that it could be withdrawn instanter, regardless of the respondents' commitments and leaving them only such time as they might require to remove themselves and their possessions from the theatre. This view must, of course, be subject to the terms which the parties have agreed. I cannot, however, find anything in the contract to modify it. On the contrary the provisions as to (*a*) the payment of rent in advance, (*b*) the continuation of the licence after the first year, and (*c*) the granting of sub-licences, though insufficient to raise an implication of permanence, all go, in my opinion, to support the conclusion which the nature of the subject-matter suggests.

If this be the position, it is clear that the right to revoke must necessarily be the subject of an implied term. It is, perhaps, not so clear what, precisely, the term should be. My Lords, in approaching that question I think it well to recall the warning given by Lord Wright in *Luxor* (*Eastbourne*), *Ld.* v. *Cooper* (1), when he said: "The general presumption is that the parties "have expressed every material term which they intended "should govern their agreement, whether oral or in writing. "But it is well recognized that there may be cases where "obviously some term must be implied if the intention of the "parties is not to be defeated, some term of which it can be "predicated that 'it goes without saying,' some term not "expressed but necessary to give to the transaction such "business efficacy as the parties must have intended. This "does not mean that the court can embark on a reconstruction "of the agreement on equitable principles, or on a view of what "the parties should, in the opinion of the court, reasonably "have contemplated. The implication must arise inevitably "to give effect to the intention of the parties." With that caution in mind and leaving what I may call the packing-up period to the general rule of law already mentioned, the conclusion I reach is that in this contract there should be implied a stipulation to the effect that, after the expiration of the first year, the licence might be terminated by the licensors on the expiration of a reasonable notice period duly communicated to the licensees. That, to my mind, is what accords best with the express terms of the contract and the nature of the transaction. Whatever the results of disregarding such a stipulation as to notice may be (and on that I express no opinion as it does not call for decision on the view I take) it is, I think, beyond question that the parties were at liberty so to agree if they chose. I am not unmindful that an implication of this nature makes it incumbent upon the licensors to specify a reasonable period and that they may not be fully versed concerning all the relevant circumstances when they have to do so. I do not think the appellants can well complain on this score, however, when their own document is silent on the point; and, apart from that consideration, I see no practicable alternative which would not leave both parties in a state of even greater uncertainty.

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(1) [1941] A. C. 108, 137.

It remains to be determined whether the licence has been revoked in accordance with this implied term. The precise meaning of the notice given by the appellants on September 11, 1945, is not beyond debate. But taken in conjunction with its covering letter of the same date I have little doubt that it should be read as intimating that the licence would be terminated on October 13, 1945, and it is clear that this was what it conveyed to the respondents, for their reply of September 14, inquires concerning the appellants' authority "to give a "month's notice terminating the said licence." But was this a reasonable period ? Apart from the term providing for payment of four weeks' rent in advance, the only evidence adduced upon this issue was the agreement dated August 22, 1945, between the respondents and Linnit & Dunfee, Ld., which the respondents pleaded and proved and under which Linnit & Dunfee, Ld. produced a play at the appellants' theatre entitled "Young Mrs. Barrington." It was admitted that the respondents were unable to terminate this agreement sooner than they did (which was on January 5, 1946), but the appellants contended that it constituted a breach of cl. 6 of the agreement of June 10, 1942, which provided that the respondents were "not to enter into a sub-licence of the theatre" without the appellants' consent and that the respondents were, accordingly, precluded from relying on it in support of their plea that, if the licence were revocable, reasonable notice had not been given. The respondents argued that this agreement was not a sub-licence and, further, that the appellants knew of the agreement and had acquiesced in the production of "Young Mrs. Barrington" so as to waive the alleged breach of cl. 6. This last point the respondents entirely failed to establish and it need not be further noticed. Nor need very much be said on the question whether the agreement of August 22, 1945, was a sub-licence of the theatre. It is true that it denied Linnit & Dunfee, Ld. the use of certain relatively small portions of the premises which were the subject of the agreement of June 10, 1942, and this, it was said, avoided a breach of cl. 6 just as a sub-lease of part only of demised premises avoids contravention of a covenant against sub-letting. My Lords, whatever the virtues of that analogy may be in the abstract, I do not consider that this contention has substance in the present case. When cl. 6 speaks of a sub-licence "of the theatre" I think that as a matter both of good sense and sound construction, it refers to the theatre premises or so much thereof as will enable the purpose of the licence, the production of "stage plays, concerts "or ballets," to be achieved by the sub-licensees. Clause 6 proceeds to stipulate that the appellants' consent to a sub-licence will not be unreasonably withheld if a mutual arrangement is made between them and the respondents for sharing the profits. It is difficult to conceive that the true meaning of this clause was such as to enable this financial provision to be circumvented to the loss of the appellants and the advantage of the respondents by the reservation of a few seats in the auditorium or some unessential office accommodation. It is also difficult not to feel that this profit-sharing term of the contract may explain why the agreement of August 22, 1945, was cast in the form of an engagement. It is now admitted that Linnit & Dunfee, Ld. were not the respondents' agents or employees. They made the agreement on their own account and by its terms were given the use of the theatre for a production, the financial risks of which they were to bear. My Lords, I find it unnecessary to detail the various clauses of this somewhat peculiar document. Whatever its guise I am satisfied that, as Roxburgh J. has held, it was in its substance a sub-licence and amounted to a breach of cl. 6. It must therefore be left out of account. This means that there is virtually no evidence before your Lordships as to what would, in the circumstances, have been a reasonable period of notice. But having regard to the course of the proceedings and the issues they chose to raise, the onus in this matter rested, in my opinion, on the plaintiffs and present respondents. They have not discharged that onus and the result, in my view, is that the notice given by the appellants must be considered valid and effectual. On similar, if not identical, grounds I think the time between October 13 and November 27, 1945—the date of the counterclaim—must be taken as a sufficient period of grace to enable the respondents to vacate the theatre.

For these reasons I would allow this appeal.

My Lords, my noble and learned friend, LORD SIMONDS, authorizes me to say that, having read this opinion, he concurs in its reasoning and conclusion, and wishes to add nothing to it.

Appeal allowed.

July 29. Counsel having made submissions as to the form of the order of the House, having regard to the rectification action pending at the suit of the respondents, their Lordships delivered the following additional opinions:

VISCOUNT SIMON. My Lords, the decision at which the House now arrives is, of course, on the documents before us, but we are informed that the respondents have instituted a rectification action alleging that the documents do not truly represent the bargain between the parties. This creates a situation which has to receive special care, and we have consulted Mr. Registrar Jones as to the Chancery practice. Lord

Buckmaster in *Nitrate Producers Steamship Co.* v. *Short Brothers* (1), explained the effect of a restoration in this House of an order made by the trial judge in the following words: "Where the effect of an order in this House is to restore a "judgment of the court of first instance which has been "reversed by order of the Court of Appeal . . . . the judgment "of the court of first instance is expressly restored and remains "standing as from the date when it was given." This House has nothing to do with the rectification issue, except to make sure that it does not prejudge any question arising in the rectification action. Accordingly, I move that in addition to the judgment of the House already given, the further order be made that: "It is ordered that the cause be, and the same is "hereby, remitted back to the Chancery Division of the High "Court of Justice, to do therein as shall be just and consistent "with this judgment, and in particular to consider whether it be "just to grant any, and if so what, further stay of the operation "of the injunction granted by the said judgment and for what "time, and upon what terms as to the payment of money or "otherwise, any such further stay should be granted."

LORD PORTER: My Lords, I concur.

LORD UTHWATT: My Lords, I agree.

LORD MACDERMOTT: My Lords, I agree.

Solicitors for appellants: *Richards, Butler & Co.*
Solicitors for respondents: *Herbert Oppenheimer, Nathan & Vandyk.*

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(1) (1922) 91 L. J. (K. B.) 871, 873.

J. C.*

1947

Dec. 18.

[PRIVY COUNCIL.]

PRODUCERS' CO-OPERATIVE DISTRIBUTING SOCIETY, LIMITED . . . APPELLANT;

AND

COMMISSIONER OF TAXATION . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—New South Wales—Revenue—Income tax—Exemption—Rural society—Sale of butter—Made by co-operative societies—Whether "agricultural product"—Co-operation Act, 1923–41 (*N.S.W. No.* 1 *of* 1924 *to No.* 44 *of* 1941), *s.* 5—*Income Tax Management Act* (*N.S.W.*) *No.* 48 *of* 1941, *s.* 19 (*o*).

Butter made by co-operative societies, which were members of the appellant society, a rural society registered as such under the Co-operation Act, 1923–41, from cream sold to them by farmers was not a product of the use of the farmers' land for a dairying purpose and therefore not an "agricultural product," as defined in the Act of 1923–41, of the co-operative societies, and accordingly the appellant, whose principal business consisted in selling the butter on behalf of its member societies, was not entitled to exemption from income tax under s. 19 (*o*) of the Income Tax Management Act, 1941, of New South Wales, which conferred exemption on a rural society if its principal business was, inter alia, the disposal of the agricultural products (as defined in the Act of 1923–41) of its members.

While assuming that if the farmer himself made the butter it would be an "agricultural product" within the meaning of the definition, the finished product produced by the factory operations conducted by the co-operative societies could not be properly characterized as the product of the use of the land to which the raw material owed its origin—the operations of the butter making industry, rightly viewed, did not form part of the chain linking the ultimate result—the butter—to the use of the farm land. There were two industries, the farming industry and the butter making industry, which, though closely related, were independent, and the produce of the latter industry was not in any real sense the product of the former.

Judgment of the High Court of Australia 69 C. L. R. 523, affirmed.

APPEAL (No. 57 of 1946), by special leave, from a judgment and order of the High Court of Australia (December 11, 1944) affirming a judgment and order of the Full Court of the

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* *Present:* LORD PORTER, LORD SIMONDS, LORD UTHWATT, LORD NORMAND and LORD MACDERMOTT.

Supreme Court of New South Wales (October 4, 1944), which, in turn, had upheld a decision (May 10, 1944) of the Board of Appeal constituted by the New South Wales Income Tax Management Act, 1941.

The appellant was a rural society registered as such under the Co-operation Act, 1923–1941, of the State of New South Wales. Its members were some 9,500 in number. Most of the members were individual farmers, but nearly 100 co-operative societies registered under the Act were also members. The business of the appellant consisted in the sale on commission of butter, bacon and other like commodities. Its principal business consisted in selling on behalf of those of its members which were co-operative societies butter made by those societies from cream sold to them by farmers. The appellant having been assessed to income tax in respect of its income for the year ended September 30, 1941, claimed exemption from the tax by virtue of s. 19 (*o*) of the New South Wales Income Tax Management Act, 1941, which, so far as relevant, ran as follows: "The following income shall be exempt from "income tax: "(O) the income . . . . of a rural society "registered as such under the Co-operation Act, 1923–1941, if "the principal business of that rural society is the manufacture, "treatment or disposal of the agricultural products (as defined "in that Act) or livestock of its members." The incorporated definition contained in the Co-operation Act, 1923–1941, was in the following terms: "Unless the context or subject-"matter otherwise indicates or requires—'Agricultural pro-"'ducts' means products of any rural industry." "'Rural "'industry' means the cultivation or use of land for any "agricultural, pastoral, dairying or rural purpose."

The Board of Appeal disallowed the appellant's claim, and that decision was upheld by the Supreme Court of New South Wales (Davidson and Halse Rogers JJ., Jordan C.J. dissenting), whose judgment was in turn affirmed by the High Court of Australia (Latham C.J., Williams and Dixon JJ., Rich and Starke JJ. dissenting).

1947. July 29, 30, 31. *Sir Valentine Holmes K.C.*, *Donovan K.C.* and *Ackner* for the appellant.

C. A. Weston K.C. (of the Australian Bar) and *Arthian Davies K.C.* for the respondent.

Dec. 18. The judgment of their Lordships was delivered by

LORD UTHWATT. The point raised by this appeal has a considerable practical importance. It is also one of some difficulty, as appears from the fact that Jordan C.J. in the Full Court and Rich and Starke JJ. in the High Court expressed dissenting opinions. There was uncontradicted evidence that butter making exists as a distinct industry in the State. In the early days it was the practice of farmers to make their own butter. Proprietary companies then came on the scene and started building creameries in the various milk producing centres. The farmer's dairying practice changed and he contented himself with separating his cream and sending it to the creamery. With the growth of the co-operative movement butter factories were built all over the State, the proprietary companies being pushed aside by the co-operative societies. The effect of the evidence is pointedly and accurately summed up by Latham C.J. in the statement that "it shows that to-day "the making of butter has become a factory process, separated "from the farm."

The provision containing the exemption from income tax on which the appellant relies is s. 19 of the Income Tax Management Act, 1941, of New South Wales. [His Lordship read the section and the incorporated definition contained in the Co-Operation Act, 1923–41, and continued :] Agricultural products means, therefore, the products of the cultivation or use of land for any agricultural, pastoral, dairying or rural purpose.

The question which emerges for decision is whether the butter made by the manufacturing societies and sold for their account—it may be conveniently called the relevant butter—is vis-à-vis the appellant society "an agricultural product "of its members." If it is, then, inasmuch as the principal business of the appellant, which is clearly a rural society, consists of the disposal of the relevant butter, the claim for exemption is made out. The appellant's submissions are that the relevant butter is a product of the use of the farmer's land for a dairying purpose, or, alternatively, a product of the use of the factory land for that purpose, and therefore an agricultural product. In connexion with its first submission the appellant contends that the phrase "products of its members" does not connote production by its members.

It is convenient to deal first with the alternative submission of the appellant. In their Lordships' view it is inaccurate to describe butter resulting from factory operations made out of cream bought from many sources, as a product of the use of the factory land. The use of the factory land necessarily entered into the operation of making the relevant butter—the use of land enters into most forms of human activity—but to attribute the product to the use of the factory land rather than to the raw materials and the operations to which those materials are subjected is to neglect the substance of the matter, and to seize on a feature common to all factory operations as the feature marking out the origin of the product of a particular factory operation.

The first contention of the appellant cannot be disposed of so easily. In connexion with it the appellant sought to draw from a detailed examination of the substantive provisions of the Co-operation Act an inference as to the meaning proper to be attributed to the definition of agricultural products as that definition is incorporated in the Income Tax Management Act. On the legitimacy of such an examination and its effect, if it be admissible, their Lordships agree with the opinion expressed by Latham C.J. To interpret the incorporated definition in the second Act by an analysis of its exact meaning in the substantive provisions of the first Act, where that definition applies only unless the context or subject matter otherwise indicates or requires, is not a rational procedure. It is, however, permissible, inasmuch as under the Co-operation Act the term agricultural products is almost entirely used in connexion with rural societies, to take into account the activities which are open to those societies under the Co-operation Act. They may explain the general meaning and application of the definition. The only relevant matter, however, that emerges from a consideration of s. 7 of the Co-operation Act, where those activities are enumerated, is that in them a distinction is drawn between agricultural products and products which are manufactured out of agricultural products or result from their treatment. In the general contemplation of the definition, therefore, treatment of an agricultural product may result in an article which is not an agricultural product within the definition.

The point at issue under the first contention of the appellant is, as Rich J. observes, a narrow one and it is within a small compass. Their Lordships agree with Rich J. that products include products derived at some remove from the farmer's land. It may be that agricultural products include articles which are not agricultural produce, but it does not follow that all articles falling according to common conception within the

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genus agricultural produce—and butter is such an article—are agricultural products as defined. The definition demands that the facts bearing on the production of the particular article under consideration are to be taken into account. The treatment to which the raw material is subjected and the circumstances in which it is accorded that treatment may be such that the finished article cannot be fairly regarded as a product of the use of the land to which the raw material owes its origin. In this case the relevant land is exclusively the farmer's land. The use to which that land is put is the production of milk and cream and, stating the case at its highest in favour of the appellant, production with a view to the subsequent conversion of cream into butter. Their Lordships are prepared to assume that, did the farmer himself make the butter, such butter would be an agricultural product within the meaning of the definition. In such a case the farmer uses or cultivates his land for the production of butter just as he uses or cultivates it for the production of milk and cream. But from the fact that butter may be an agricultural product as defined it does not, in their Lordships' view, follow that butter which is not solely the product of the farmer's use or cultivation of his land must also be an agricultural product as defined. In this particular case such use or cultivation results only in one definite product—cream. At that stage a distinct organized industry appears on the scene. Is the finished product produced by the factory operations—the relevant butter—to be properly characterized as the product of the use of the land to which the raw material owes its origin ? Or, to put the point in another way, are the operations of this industry such that, rightly viewed, they form part of the chain linking the ultimate result—the relevant butter—to the use of the farm land ? The exact statement of a question usually supplies the answer. In this case it does not, for the question is largely one of degree ; and it does not surprise their Lordships that different answers have been given to it. In their Lordships' view the answer is in the negative. In their opinion an affirmative answer would fail to give due weight to the place held by manufacturing societies in the working economy of the State. There are two industries, the farming industry and the butter making industry. The industries are, indeed, closely related, but they are independent, and the product of the latter industry is not in any real sense the product of the former industry. The appellant's first contention in their Lordships' opinion therefore fails.

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The conclusions at which their Lordships have arrived render it unnecessary for them to express any opinion on the meaning of the phrase "of its members" and they accordingly do not propose to deal with that matter. Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Herbert Oppenheimer, Nathan & Vandyk.*

Solicitors for respondent: *Light & Fulton.*

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1948
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[PRIVY COUNCIL.]

JOSEPH . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Fiji — Criminal law — Trial with assessors — Non-compliance with statutory requirements—Failure to deliver judgment—Code of Criminal Procedure (*No.* 19 *of* 1944), *ss.* 156, 157, 248, 308, *sub-s.* 2.

Where the trial of the appellant on a charge of murder took place before a judge with the aid of assessors, and the judge, having summed-up to the assessors, left the appreciation of the evidence to them and accepted their unanimous conclusion of "guilty of manslaughter" as the verdict of a jury which bound him, instead of regarding it merely as an opinion which might help him in arriving at his own conclusion, and thereupon, and without himself pronouncing judgment as required by ss. 156 and 157 of the Criminal Procedure Code of Fiji, though he expressed the opinion that the appellant had been very properly convicted, passed sentence of five years' penal servitude, the appellant in the result had been convicted by assessors who had no power to try or to convict him, and sentenced by a judge who had not convicted him. The appellant was entitled to be tried by the judge and had not been so tried, and the conviction and sentence must be quashed.

APPEAL (No. 93 of 1946), in forma pauperis by special leave, against the purported conviction of the appellant by the Supreme Court of Fiji (Criminal Jurisdiction) (September 10, 1945) for manslaughter and the sentence of five years' penal servitude passed on him.

* *Present:* LORD UTHWATT, LORD OAKSEY and SIR JOHN BEAUMONT.

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The appellant, aged about twenty-four years, jointly with two younger men, was charged with, and tried for, the murder of a child named Ravindra, eight months old. The trial took place in the circuit court at Lautoka before Seton C.J. and five assessors. Ravindra was killed about midnight on February 4, 1945, by a bullet which came through the floor of a store in which he was sleeping. The store was on a hill and was raised on stilts, and the bullet was one of five fired from about 150 yards from the store. The case for the Crown was that the appellant had had a quarrel with Ravindra's father, Chotabhai Patel, the proprietor of the store, and that acting in concert with the two younger men, he had fired the weapon for the purpose of frightening him. All the accused pleaded " not guilty," and the appellant deposed that he had not participated in the shooting, and had been asleep in his house on the night in question.

All three accused were acquitted of murder, but found guilty of manslaughter, and the judge passed sentence without himself delivering judgment as required by the Criminal Procedure Code.

The Criminal Procedure Code of Fiji contains the following provisions :

" 156.—(1.) The judgment in every trial in any criminal " court in the exercise of its original jurisdiction shall be " pronounced, or the substance of such judgment shall be " explained, in open court either immediately after the termin- " ation of the trial or at some subsequent time of which notice " shall be given to the parties and their advocates, if any :

" Provided that the whole judgment shall be read out by " the presiding judge or magistrate if he is requested so to do " either by the prosecution or the defence.

" 157.—(1.) Every such judgment shall, except as otherwise " expressly provided by this code, be written by the presiding " officer of the court in English, and shall contain the point or " points for determination, the decision thereon and the reasons " for the decision, and shall be dated and signed by the presiding " officer in open court at the time of pronouncing it.

" (2.) In the case of a conviction the judgment shall specify " the offence of which, and the section of the Penal Code or " other law under which, the accused person is convicted, and " the punishment to which he is sentenced."

" 248. Every trial before the Supreme Court in which the " accused or one of them or the person against whom the crime

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"or offence has been committed or one of them is a native or of "native descent, or of Asiatic origin or descent, shall be with "the aid of assessors in lieu of a jury, unless the presiding "judge for special reasons to be recorded in the minutes of the "court thinks fit otherwise to order, and upon every such trial "the decision of the presiding judge with the aid of such "assessors on all matters arising thereupon which in the case "of a trial by jury would be left to the decision of the jurors "shall have the same force and effect as the finding or verdict "of a jury thereon."

"308.—(1.) When, in a case tried with assessors, the case on "both sides is closed, the judge may sum up the evidence for "the prosecution and the defence, and shall then require each "of the assessors to state his opinion orally, and shall record "such opinion.

"(2.) The judge shall then give judgment, but in doing so "shall not be bound to conform to the opinions of the assessors.

"(3.) If the accused person is convicted, the judge shall "pass sentence on him according to law."

1947. Dec. 8. *Dingle Foot* and *Gavin Simonds* for the appellant. Instead of recording the opinion of the assessors and then delivering judgment himself, as required by s. 308 of the Criminal Procedure Code, the Chief Justice, who was the trial judge, treated the assessors as if they were a jury, and summed-up the evidence to them as if the final decision as to the guilt or innocence of the accused rested with them—he treated their opinions as the verdict and finally passed sentence without delivering any judgment. [Three passages in the charge to the assessors were referred to in support of that contention.] Those passages show that the judge was treating the assessors as if they were a jury, and there does appear to be a general misunderstanding on this matter in Fiji. Section 308 of the Code clearly contemplates a further step after the assessors have given their opinion, and the assessors cannot relieve the judge of the responsibility which is placed on him. Under s. 157 there must be a written judgment setting out the final decision and the reasons for arriving at that decision. For an appeal to come before this Board it is essential that there should be a judgment to appeal from. This was much more than an irregularity; it was a substantial breach of the Code, and the trial was carried out in a way which the Code does not authorize: *N. A. Subramania Iyer* v. *King-*

Emperor (1), *Abdul Rahman* v. *King-Emperor* (2) and *Muhammad Nawaz* v. *King-Emperor* (3). It is impossible to say at what decision the judge would have arrived if the matter had been left to him—if he had assumed responsibility. The judge's pronouncement is in fact the final determination at which the court arrives, and if he has not given a judgment the position is the same as if in a trial in this country the jury has not brought in a verdict. All that has happened in the present case is that opinions have been expressed by five persons—the assessors—but they have no effect. Taking all the circumstances together, it is abundantly clear that this trial was conducted as if it was a jury trial, and the accused was deprived of something to which he is entitled under the Code, namely, the finding of the judge. [He was stopped.]

Gahan for the Crown. First of all, the judge in the way in which he summed-up the case to the assessors and by what he said in passing sentence made it quite clear that he regarded the accused as not guilty of murder but as guilty of manslaughter. If it is possible to infer what the judge himself thought—and he agreed with the view of the assessors—then under the rules on which this Board acts in criminal matters the appeal ought not to succeed. There was one charge only in this case, murder, and the conviction of manslaughter comes about in exactly the same way as in this country, where it would be open on a charge of murder to find the accused guilty of manslaughter. It is sufficient to show that the judge made up his mind about the charge of murder and the conviction of manslaughter, and when he said that the accused were very properly convicted of manslaughter he agreed with that, and would have reached the same conclusion himself. Although the Chief Justice did not deliver judgment in strict accordance with the Code, he clearly stated his own opinion that the accused were guilty of manslaughter, and accordingly no injustice has been caused by the irregularity. [Reference was made to *Renouf* v. *Attorney-General for Jersey* (4) and, on the effect of irregularities, to *Abdul Rahman* v. *King-Emperor* (5) and *Pulukuri Kotayya* v. *King-Emperor* (6).] Where there has been an imperfect trial the ordinary course is for a new trial, and it is within the discretion of the Board to order one.

(1) (1901) L. R. 28 I. A. 257.
(2) (1926) L. R. 54 I. A. 96, 108.
(3) (1941) L. R. 68 I. A. 126.
(4) [1936] A. C. 445, 471, 475.
(5) L. R. 54 I. A. 96, 104–5.
(6) (1947) L. R. 74 I. A. 65.

Dingle Foot replied. If it is open to me to go into the question of substantial miscarriage of justice, the evidence here is not such as to support the conviction. It is submitted, however, that where, as here, there has been a breach of the Code, that in itself is a miscarriage of justice. Here an essential step in the criminal procedure of Fiji has been omitted: *Crane* v. *Public Prosecutor* (1). The question of a new trial could only arise here if the Board took the view that there has been no trial at all.

1947. Dec. 9. LORD UTHWATT announced that their Lordships would humbly advise His Majesty that the appeal should be allowed and the conviction and sentence quashed, and that they would give their reasons later.

1948. Jan. 12. The judgment of their Lordships was delivered by SIR JOHN BEAUMONT. This is an appeal against the purported conviction of the appellant by the Supreme Court of Fiji (Criminal Jurisdiction) on September 10, 1945, for the manslaughter on February 4, 1945, of a child named Ravindra, and against the sentence of five years' penal servitude thereupon passed on the appellant. At the conclusion of the arguments their Lordships announced that would they humbly advise His Majesty that the appeal should be allowed and the conviction and sentence quashed, and they now state their reasons.

The question of law which arises in this appeal is similar to that which arose in Appeal No. 94 of 1946 (2), which was

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(1) [1921] 2 A. C. 299.

(2) The judgment of their Lordships (Lord Uthwatt, Lord Oaksey and Sir John Beaumont) in Appeal No. 94 of 1946 concluded with the following paragraph: It is plain that, under these provisions [ss. 156, 157, 248 and 308 of the Criminal Procedure Code of Fiji] the judge is required to give judgment, and it is for him to convict or acquit and, in so doing, he is not bound by the opinion of the assessors. At the present trial the learned judge summed-up the case to the assessors, and there is on the record a short note of his summing-up. He appears to have treated the assessors as a jury and to have left to them the decision on all questions of fact. At the conclusion of the trial, the assessors both found the accused guilty of the offence under s. 4 of the Arms Ordinance [possession of a revolver without a licence], and thereupon the learned judge passed sentence without delivering any judgment or even stating whether or not he agreed with the view of the assessors. The provisions of the Code above referred to were completely ignored, and in the

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heard by their Lordships' Board immediately before this appeal, though the facts in this appeal are different.

The appellant, with two other men, was charged with the offence of murder under s. 220 of the Penal Code of Fiji, and the trial took place before the learned Chief Justice of Fiji with the aid of five assessors. [His Lordship then stated the sections of the Code as set out above, and continued :] At the close of the evidence the learned Chief Justice charged the assessors. The charge was a full and fair one, but there is no doubt that the learned Chief Justice treated the assessors as a jury and left to them the decision on all questions of fact. To illustrate this the conclusion of the summing-up may be quoted : " I remind you that, as Mr. Prichard has truly said, " the onus of proof in these criminal cases is on the Crown, " and you should consider the case of each one of these accused " separately, and you should not convict any of them unless " you are satisfied beyond reasonable doubt that the crime has " been brought home to him. And you will remember, on " the subject of murder, that if they are to be convicted of " murder you must be satisfied, not only that they took part " in the shooting, but also that at that time they had the " intention to cause death or grievous bodily harm. If you " are not satisfied of that, none of them should be found guilty " of murder. But if, on the other hand, you are satisfied that " they did go in a party in common agreement to shoot up " the store, that they were quite reckless whether they killed " anybody or not, but that they had not formed any intention " to kill, then your verdict should be manslaughter." Each of the assessors expressed the opinion that the accused were guilty of manslaughter. They then returned a verdict " Guilty " of manslaughter." The learned Chief Justice did not pronounce judgment as required by ss. 156 and 157 of the Procedure Code, nor did he specify under which section of the Penal Code the accused were convicted. In passing sentence, however, he expressed the opinion that the accused had been very properly convicted of an outrageous offence. In the result the appellant has been convicted by assessors who had no power to try or convict him, and sentenced by a judge who had not convicted him.

result the appellant was convicted by assessors who had no power to convict him, and sentenced by a judge who had not convicted him. In the circumstances their Lordships could only advise His Majesty that the conviction and sentence be quashed.

Mr. Gahan, for the Crown, has argued that in this case there has been no such substantial miscarriage of justice as would justify this Board, acting in accordance with the principles on which the Board always acts in criminal cases, in advising His Majesty to interfere with the conviction. He points out that it is reasonably clear from the charge to the assessors that the learned Chief Justice thought that the accused were not guilty of murder, but were guilty of manslaughter, and that, in passing sentence, he expressed his approval of the conviction. It is no doubt possible, and even probable, that if the learned Chief Justice had tried the case in accordance with the provisions of the Procedure Code he would have reached the conclusion which the assessors reached, namely, that the accused were guilty of manslaughter. This, however, is matter of conjecture. The learned Chief Justice does not appear to have brought his own mind to bear on the question of the guilt or innocence of the accused. He left the appreciation of evidence to the assessors, and accepted their conclusion as the verdict of a jury which bound him, instead of regarding it merely as an opinion which might help him in arriving at his own conclusion. The appellant was entitled to be tried by the judge and he has not been so tried and, in the circumstances, the only course open to the Board was to advise His Majesty to allow the appeal and quash the conviction and sentence.

Solicitors for appellant: *Barrow, Rogers & Nevill.*
Solicitors for respondent: *Burchells.*

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DABHOLKAR . . . . . . APPELLANT;

AND

THE KING . . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Eastern Africa—Criminal law—Surgical treatment given negligently—Degree of negligence necessary for conviction—Tanganyika Penal Code, 1930, *s.* 222 (*e*).

The negligence charged in s. 222 of the Tanganyika Penal Code is not necessarily as grave, either in its nature or its consequences, as in the offence of manslaughter, and it is not necessary for the prosecution to prove the same high degree of negligence under that section as in a prosecution for manslaughter.

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* *Present:* LORD UTHWATT, LORD OAKSEY and SIR JOHN BEAUMONT.

Andrews v. *Director of Public Prosecutions* [1937] A. C. 576, applied by analogy.

Judgment of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 44 of 1946), by special leave, from a judgment of the Court of Appeal for Eastern Africa (November 10, 1944), which confirmed the appellant's conviction of negligence under s. 222 of the Tanganyika Penal Code by the Sessions Court of Tanganyika at Arusha (February 15, 1944) and the sentence of three months' imprisonment with hard labour passed on him.

The appellant was a Licentiate of the College of Physicians and Surgeons of Bombay, India, and had been registered with the Bombay Medical Council, India, since 1926. He was employed as a sub-assistant surgeon by the medical Department of the Tanganyika Government from 1929 till February 15, 1944, when his service was terminated by the government owing to the conviction out of which this appeal arose. The count on which the appellant was found guilty was as follows:

Statement of Offence.

Giving surgical treatment negligently and in a manner likely to endanger life or to cause harm contrary to s. 222 of the Penal Code.

Particulars of Offence.

Vishwanath Vishnu Dabholkar . . . . on about the 22nd day of July, 1943, in the Northern Province surgically treated one Elenora Kopko in such a negligent manner as to be likely to endanger her life or to cause her harm.

By s. 222 of the Tanganyika Penal Code:

" 222. Any person who in a manner so rash or negligent as " to endanger human life or to be likely to cause harm to any " other person—

" (*a*) drives any vehicle or rides on any public way; or

" (*b*) navigates, or takes part in the navigation or working " of any vessel; or

" (*c*) does any act with fire or any combustible matter, " or omits to take precautions against any probable danger " from any fire or any combustible matter in his possession; " or

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" (*d*) omits to take precautions against any probable " danger from any animal in his possession; or

" (*e*) gives medical or surgical treatment to any person " whom he has undertaken to treat; or

" (*f*) dispenses, supplies, sells, administers or gives away " any medicine or poisonous or dangerous matter; or

" (*g*) does any act with respect to, or omits to take proper " precautions against any probable danger from any " machinery of which he is solely or partly in charge; or

" (*h*) does any act with respect to, or omits to take proper " precautions against any probable danger from any explosive " in his possession

" is guilty of a misdemeanor."

The Court of Appeal for Eastern Africa (Sheridan C.J., Whitley C.J. and MacRoberts J.) quashed the appellant's conviction on a charge of being an accessory after the fact to an attempt to procure an abortion, but, as stated, confirmed his conviction on the charge of negligence under s. 222 of the Penal Code.

1947. Dec. 4. *Khambatta K.C.* and *Umrigar* for the appellant. There is no question of the treatment administered by the appellant being legal, and the only issue is whether the Court of Appeal applied the right test to the facts of this case when they said " it is not necessary for a conviction under " s. 222 (*e*) of the Penal Code that the negligence should be of " that high degree which is necessary for a conviction for " manslaughter. Something of a lesser degree is all that is " necessary . . . ." One does not expect from a village practitioner the same degree of skill and judgment that one would get from a Harley Street specialist, but that does not make the former guilty of criminal negligence—the Court of Appeal wrongly applied that sort of test. They erred in holding that a lesser degree of negligence is sufficient to satisfy the offence of criminal negligence, relying on *Andrews* v. *Director of Public Prosecutions* (1), and failed to appreciate that a higher degree of negligence is necessary in a criminal case: *Rex* v. *Bateman* (2). which was approved in *Akerele* v. *The King* (3). If the test they should have applied is that the higher degree is applicable, then the error has resulted in a grave miscarriage of justice. The only difference between

(1) [1937] A. C. 576.
(2) (1925) 94 L. J. (K. B.) 791.
(3) [1943] A. C. 255.

manslaughter and this case is in the result of the negligence, and the question then resolves itself into whether there is a difference in the negligence to be imputed against a medical practitioner where the surgical treatment causes death and a different degree of negligence where it has only caused harm endangering life. The ingredients of the offence of negligence by medical practitioners remains the same—there must be gross negligence whether in a case of manslaughter or in a case under s. 222. This case is not concluded by the decision in *Andrews* v. *Director of Public Prosecutions* (1). If I am wrong on the law, it is submitted that there is no evidence here of any degree of criminal negligence, and that the evidence at its highest amounts either to error of judgment or to acts of indiscretion, but not to negligence.

Gahan, for the Crown, distinguished *Akerele* v. *The King* (2), but was not otherwise called upon.

1948. Jan. 12. The judgment of their Lordships was delivered by LORD OAKSEY, who stated the facts and the terms of s. 222 of the Penal Code as set out above, and continued: It is not necessary to restate the facts in detail since the only questions argued before their Lordships' Board were first, whether the Court of Appeal were right in holding that it was not necessary for the prosecution to prove the same high degree of negligence under s. 222 as in a prosecution for manslaughter and, second, whether there was any evidence upon which the courts in Eastern Africa were entitled to convict the appellant under sub-s. (*e*) of the said section.

Their Lordships are of opinion that the Court of Appeal were right in the interpretation which they put on s. 222. The negligence charged in that section is not necessarily as grave, either in its nature or its consequences, as in the offence of manslaughter. The analogy between this section and s. 11 of the English Road Traffic Act, 1930, is, in their Lordships' view, a true analogy, and just as in *Andrews* v. *Director of Public Prosecutions* (1) the House of Lords explained the different degrees of negligence which the prosecution must prove to establish the offences of manslaughter and dangerous driving, so in the case of s. 222 the degree of negligence differs in cases of the felony of manslaughter and in cases of misdemeanor under s. 222. The circumstances dealt with in the subsections of s. 222 are all circumstances which in themselves

(3) [1937] A. C. 576. (2) [1943] A. C. 255.

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involve danger and, although the negligence which constitutes the offence in these circumstances must be of a higher degree than the negligence which gives rise to a claim for compensation in a civil court, it is not, in their Lordships' opinion, of so high a degree as that which is necessary to constitute the offence of manslaughter.

On the second question their Lordships are of opinion that there was evidence and, in particular, the evidence of Dr. Forrest and the witness Mike, which justified the conviction of the appellant and that no case of miscarriage of justice has been established. Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed.

Solicitors for appellant: *T. L. Wilson & Co.*
Solicitors for respondent: *Burchells.*

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ADAN HAJI JAMA AND OTHERS . . APPELLANTS;

AND

THE KING . . . . . . RESPONDENT.

ON APPEAL FROM THE PROTECTORATE COURT OF APPEAL OF SOMALILAND.

Somaliland Protectorate—Criminal law—Murder—No prosecutor—Judge acting as prosecutor—Trial vitiated—Conviction quashed—Acquittal —Somaliland Protectorate Administration of Criminal Justice Ordinance, 1926, *s.* 4, *sub-s.* 1 (*q*); *ss.* 226, 256, 393.

Where at the trial of the appellants on a charge of murder nobody appeared on behalf of the Crown to prosecute, and the trial judge himself undertook the duties of the prosecution, the combination in one person of the duties of prosecutor and judge prevented the trial from being one conducted substantially in the manner required by the relevant provisions of the Administration of Criminal Justice Ordinance, 1926, of the Somaliland Protectorate, and it was vitiated. The curative provisions of s. 393 of the Ordinance could not be called in aid to support such a trial, and the convictions and death sentences passed on the appellants must be quashed and the appellants acquitted.

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* *Present:* LORD UTHWATT, LORD OAKSEY and SIR JOHN BEAUMONT.

Pulukuri Kotayya and Others v. *King-Emperor* (1947) L. R. 74 I. A. 65 and *The Queen* v. *Hezell* (1844) 1 Cox C. C. 348, referred to.

Judgment of the Protectorate Court of Appeal reversed.

Appeal (No. 95 of 1946), by special leave, from a judgment of the Protectorate Court of the Somaliland Protectorate sitting as a Court of Appeal (May 30, 1946) which dismissed the appellants' appeal from a judgment of the Protectorate Court of the Somaliland Protectorate sitting as a court of original jurisdiction (December 19, 1945) and confirmed the death sentences for murder passed on the appellants by the latter court.

The case for the Crown was that the appellants, with a number of others who were charged with them, were members of an unlawful assembly which, with the common purpose of carrying out an attack on non-Muslims on the night of July 2–3, 1945, entered Burao armed with rifles and fired first at the sentry on duty at the Quarter Guard at Burao prison. The sentry was not injured, but one prisoner was killed and another wounded. It was alleged that the men then made off, and that a few minutes later shots were fired at the bungalow occupied by the District Commissioner and his wife, and that an illaloe (tribal policeman) on duty there was wounded and died later in the night from the wound.

The trial of the appellants and the other accused took place before Major R. J. Quin, sitting with three assessors, but nobody was appointed to act as prosecutor. The appellants, who had pleaded " not guilty," were, as stated, found guilty of murder and sentenced to death, and their appeals to the Protectorate appellate court (Lieut.-Col. Donald Jackson) were dismissed and the death sentences confirmed.

The main question in this appeal was whether the trial was vitiated by the failure of a prosecutor to appear at the trial, and by the course which the trial took in his absence.

By the Administration of Criminal Justice Ordinance, 1926, of the Somaliland Protectorate: Section 4 (1.). . . . .

" (*q*) ' Public Prosecutor ' means any person appointed " under section 356 and includes any person conducting a " prosecution on behalf of His Majesty in the Protectorate " Court in the exercise of its original criminal jurisdiction."

220. " All trials before the Protectorate Court shall, save " where otherwise provided, be with the aid of assessors."

226. " (1.) When the assessors have been chosen, the

"prosecutor shall open his case by stating the description of "the offence charged, and stating shortly by what evidence he "expects to prove the guilt of the accused.

"(2.) The prosecutor shall then examine his witnesses."

229. "(1.) When the evidence of the witnesses for the "prosecution and examination (if any) of the accused are "concluded, the accused shall be asked whether he means to "adduce evidence.

"(2.) If he says that he does not, the prosecutor may sum "up his case . . . .

"(4.) If the accused, or any one of several accused, says that "he means to adduce evidence, and the Court considers that "there is evidence that he committed the offence, or if, on "his saying that he does not mean to adduce evidence, the "prosecutor sums up his case and the Court considers that "there is evidence that the accused committed the offence, "the Court shall call on the accused to enter on his defence."

232. "If the accused, or any of the accused, adduces any "evidence, the prosecutor shall be entitled to reply."

236. "(1.) When, in a case tried with the aid of assessors, "the case for the defence and the prosecutor's reply (if any) "are concluded, the Court may sum up the evidence for the "prosecution and defence, and shall then require each of the "assessors to state his opinion orally, and shall record such "opinion.

"(2.) The Judge shall then give judgment but in doing so "shall not be bound to conform to the opinions of the "assessors."

296. "An appeal shall lie from any judgment or order of the "Protectorate Court, sitting as a Court of original jurisdiction "to the Protectorate Court sitting as a Court of Appeal."

356. "(1.) The Governor may appoint generally, or in any "case, or for any specified class of cases, in any local area, "one or more officers to be called Public Prosecutors.

"(2.) In any case committed for trial to the Protectorate "Court the Governor may appoint any officer of the administration not being an officer of police below the rank of Superior "Police Officer to be Public Prosecutor for the purpose of such "case."

357. "The Public Prosecutor may appear and plead without "any written authority before any Court in which any case of "which he has charge is under inquiry, trial or appeal."

358. "Any Public Prosecutor may, with the consent of the

" Court, or on the instructions of the Governor, in cases before " the judgment is pronounced, withdraw from the prosecution " of any person ; and, upon such withdrawal :

" (*a*) If it is made before a charge has been framed, the " accused shall be discharged.

" (*b*) If it is made after a charge has been framed, or when " under this Ordinance no charge is required, he shall be " acquitted."

393. " Subject to the provisions hereinbefore contained, no " finding, sentence or order passed by a Court of competent " jurisdiction shall be reversed or altered on appeal or revision " on account—

" (*a*) of any error, omission or irregularity in the complaint, " summons, warrant, charge, proclamation, order, judgment " or other proceedings before or during trial or in any " inquiry or other proceedings under this Ordinance ; or

" (*b*) of the want of or any irregularity in any sanction " required by section 155 or any irregularity in proceedings " taken under section 346 ; or

" (*c*) of the omission to revise any list of assessors in " accordance with section 243 ;

" unless such error, omission, irregularity or want has, in fact, " occasioned a failure of justice.

" *Explanation.*—In determining whether any error, omission " or irregularity in any proceeding under this Ordinance has " occasioned a failure of justice, the Court shall have regard to " the fact whether the objection could and should have been " raised at an earlier stage in the proceedings."

413. " No Judge or Magistrate shall, except with the " permission of the Court to which an appeal lies from his Court, " try or commit for trial any case to or in which he is a party, " or personally interested.

" *Explanation.*—A Judge or Magistrate shall not be deemed " to be a party, or personally interested, within the meaning " of this section, to or in any case by reason only that he is " concerned therein in a public capacity, or by reason only " that he has viewed the place in which an offence is alleged " to have been committed, or any other place in which any " other transaction material to the case is alleged to have " occurred, and made an inquiry in connexion with the case."

1947. Dec. 8, 9. *Quass* for the appellants. There are four grounds on which it is submitted that these convictions should be set aside. First, the trial offends against all principles of criminal justice on which, at any rate, English law rests, in that there was a failure to provide a prosecutor and the judge acted as prosecutor as well as judge. That was also a plain breach of the relevant provisions of the Somaliland Administration of Criminal Justice Ordinance, 1926. Secondly, this was a trial with assessors, and the judge did not, as he was bound to do, obtain the opinion of the assessors, but delivered judgment without doing so. Thirdly, at any rate so far as three of the four appellants are concerned, there was no evidence that any of them were members of the assembly when it became unlawful. Fourthly, in both courts below it has been taken that the English law requiring corroboration of the evidence of an accomplice should be applied, and it is submitted that there was no corroboration here of the evidence of the accomplice. With regard to the first point, the trial lasted twenty-five days, and nobody appeared on behalf of the Crown to prosecute. It is clear under the Ordinance of 1926 that there is no justification for the judge acting as prosecutor, but the complaint is much more serious than that ; it is quite impossible to conceive of a judge being able to combine these two functions. Here the judge did his best to hold the scales evenly, but in the circumstances that was quite impossible. That is the most serious complaint against this trial. In *The Queen* v. *Hezell* (1) the judge did apparently act as prosecutor to some extent, but in *The Queen* v. *Page* (2), he said : " I will not do it, it is indecent." As to the second point (supra), the judge asked the assessors a series of questions, but he never asked them for their opinion ; under s. 236 of the Ordinance he is required to do so, and it is submitted that his omission is a fundamental error in the mode of trial. If there has been a defect in the mode of trial or a plain disregard of legal procedure, still more if the submission that the absence of a prosecutor is against all the principles of natural justice is right, then s. 393 of the Ordinance, the curative section, does not come into the case at all. [Reference was made to *Pulukuri Kotayya* v. *King-Emperor* (3).] If s. 393 of the Ordinance has to be considered, then there are two further submissions : (*a*) to deprive an accused of the essential protection that the criminal procedure lays down is itself a miscarriage of justice ; and (*b*) if the judge was disqualified from

(1) (1844) 1 Cox C. C. 348.
(2) (1847) 2 Cox C. C. 221.
(3) (1947) L. R. 74 I. A. 65.

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acting as a judge because of his taking up the position of prosecutor, then the court is not a court of competent jurisdiction, and s. 393 again does not apply. There is no way in which this can be cured.

[He was stopped.]

Gahan for the Crown. In the circumstances the judge did not act as prosecutor, but sought to conduct the trial as best he could. The first thing the prosecutor has to do under the Ordinance is to open the case; there was no opening of the case, and the witnesses for the prosecution, one after the other, were put into the box. Then what should have happened is regulated by s. 229 of the Ordinance—if the accused does not give evidence the prosecutor may sum up his case. That provision was not followed here. The judge summed up the case for the prosecution before the evidence for the defence was called, and if there had been a prosecutor there should have been no summing up at that stage. At the close of the evidence for the prosecution, however, it was right that the judge should then decide whether there was any case against the accused—that was a proper judicial function. It was to that, and that only, that the judge was directing his mind—and he did in fact accept a submission for the defence that there was no case against three of the other accused on the charge of murder. It was a judicial and impartial summing up and did not come within the summing up of the prosecutor within the meaning of the Ordinance. The judge's summing up was nothing but a critical analysis of what case, or lack of case, there was against each of the accused. The absence of a prosecutor has not occasioned a failure of justice in a trial which was fair in every respect, and therefore there is a prohibition of interference with the case on appeal under s. 393 of the Ordinance. The question of the circumstances in which this Board will advise His Majesty to interfere in criminal cases must not be confused with the effect of s. 393 of the Ordinance, and to justify the Board's interference the case must be one in which a grave injustice has been done, and that was not so here.

Quass replied.

1947. Dec. 9. Lord Uthwatt announced that their Lordships would humbly advise His Majesty that the appeal should be allowed, and that they would give their reasons later.

1948. Jan. 19. The judgment of their Lordships was

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delivered by Sir John Beaumont. At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal be allowed, and they now give their reasons. The question which arises for decision on this appeal is whether the trial of the accused was vitiated by the failure of a prosecutor to appear at the trial, and by the course which the trial took in his absence. Criminal procedure in the Somaliland Protectorate is regulated by the Administration of Criminal Justice Ordinance, 1926, of the Somaliland Protectorate (hereinafter referred to as " the Ordinance "). The Ordinance provides for a preliminary inquiry to be held before a magistrate, and for committal of accused persons to the Protectorate Court. It is not disputed that the appellants, with others, were properly committed for trial to the Protectorate Court. The provisions of the Ordinance relating to trials in the Protectorate Court in force at the date of the trial of the appellants were, so far as material, as follows: [His Lordship then cited the sections set out above and continued :] The trial commenced on October 4, 1945, before Major R. J. Quin and three assessors, and lasted for twenty-five days. Fifty-five witnesses were called for the prosecution, and nearly fifty for the defence. No public prosecutor appeared and the judge himself examined the prosecution witnesses, presumably from their depositions before the magistrate. The defence were represented by the legal officer of the Somaliland Protectorate. At the conclusion of the prosecution evidence the learned judge summed up such evidence. He explained that he did this in order that the defence might know what case they had to meet. The Ordinance does not provide for the summing up of the prosecution evidence before the witnesses for the defence are called, but the accused would not seem to have been prejudiced by this action of the learned judge.

After the conclusion of the defence evidence the learned judge summed up to the assessors. After dealing with the law relating to the evidence of an accomplice, the learned judge put certain specific questions to the assessors, and, on ascertaining from their answers that they were not prepared to accept as true any evidence given by the accomplice, the learned judge seems to have concluded that it would be useless to sum up to them further, and he did not require each of the assessors to state his opinion as required by s. 236 of the Ordinance. It has been argued that the failure of the learned judge to comply with s. 236 is a sufficient ground for allowing the appeal

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of the appellants. Their Lordships are satisfied that the breach of s. 236 did not occasion a failure of justice, and by virtue of s. 393 of the Ordinance such breach affords no ground for setting aside the conviction.

After the conclusion of the summing up, the learned judge gave judgment convicting the appellants, as already stated, and sentencing them to death. No objection seems to have been taken on the part of the accused to the absence of a public prosecutor, but in his judgment the learned judge referred to the matter in these terms: "For some reason, "which has not been communicated to me, there has not been "a prosecuting officer in this case. Although a judge is "entitled to question witnesses, he would be exceeding his "duty and acting improperly if his questions could be construed "into the cross-examination of defence witnesses. For that "reason I have refrained from asking witnesses questions in "the nature of cross-examination with the result that the "evidence of these witnesses has not been subject to the "tests which are normal in a criminal court. This is a matter "which has given an unusual advantage to the accused and "is an important factor that has largely contributed to my "finding that a considerable number of the charges have not "been proved."

The appellants preferred an appeal against their conviction, and the appeal was heard on May 30, 1946, before Lieut.-Colonel Donald Jackson, legal secretary. An objection to the trial based on the absence of a public prosecutor was taken by leave of the court as an additional ground of appeal. It seems to have been argued that the trial judge was disqualified from trying the case under s. 413 of the Ordinance as having become a party to, or personally interested in, the trial. This objection was overruled by the learned appellate judge, and their Lordships agree with him in thinking that s. 413 of the Ordinance is not applicable to the case.

The absence of a prosecutor necessarily involved a breach of s. 226 of the Ordinance, since he could neither open his case nor examine his witnesses. It is to be observed, however, that the definition of public prosecutor in the Ordinance contemplates that there may be a prosecutor other than a public prosecutor regularly appointed by the Governor under s. 356, and their Lordships cannot think that there would have been any overwhelming difficulty in securing the services of some suitable person as prosecutor, and thus avoiding the acquittal of the accused for lack of evidence tendered against them.

That course was not followed, and the judge himself undertook the duties of the prosecution. This is the real vice in the trial. Breaches of particular provisions of the Ordinance might have been cured under s. 393, but the combination in one person of the duties of prosecutor and judge, in their Lordships' view, prevented the trial from being one conducted substantially in the manner required by the Ordinance. The accused did not have the protection to which they were entitled under the Ordinance, namely, to be tried by a judge whose mind was not, and could not have been, affected by assuming the duties of a prosecutor. The curative provisions of s. 393 of the Ordinance (which is expressed in substantially the same terms as s. 537 of the Indian Code of Criminal Procedure) cannot be called in aid to support a trial conducted in a manner substantially different from that laid down in the Ordinance (*Pulukuri Kotayya and Others* v. *King-Emperor* (1)). Their Lordships have no doubt that the trial judge did his best to be scrupulously fair to the accused, but it is impossible to be sure that a judge, who himself examines the prosecution witnesses, escapes an unconscious bias in favour of accepting their evidence. The judge rightly refrained from cross-examining the defence witnesses, but it would be difficult for him unconsciously to avoid discounting some of their evidence on the ground that it might have assumed a different aspect if subjected to cross-examination. The chance, perhaps a small one, that some witnesses might have impressed their veracity on the court by the manner in which they stood up to cross-examination, was lost to the accused. It has been said many times that it is necessary not only that justice be done, but that it may be seen to be done. The accused and their friends can hardly have felt assured that impartial justice would be meted out to them by a judge who was acting as prosecutor. Reference was made before the Board to *The Queen* v. *Hezell* (2), where Cresswell J. seems, under protest, to have examined the prosecution witnesses in the absence of a prosecutor. But that case was tried by a jury, while in the present case the judge himself had to try the case.

For the above reasons their Lordships felt it necessary to advise His Majesty that the conviction of and sentences passed on the appellants be quashed and that they be acquitted.

Solicitors for appellants: *Ingledew, Brown, Bennison & Garrett.*
Solicitors for respondent: *Burchells.*

(1) L. R. 74 I. A. 65.

(2) 1 Cox C. C. 348.

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[HOUSE OF LORDS]

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Oct. 31;
Dec. 5.

RAILWAY ASSESSMENT AUTHORITY APPELLANTS;

AND

GREAT WESTERN RAILWAY CO. . RESPONDENTS.

Rating — Railway — Valuation roll — Railway hereditament — Buildings for use of staff—Temporary living and recreational accommodation—Whether "dwelling-house"—Railways (Valuation for Rating) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.

A railway company provided at one of its junctions, in the vicinity of which normal lodging-house accommodation was inadequate, a hostel erected for the exclusive use of employees temporarily working there away from their homes. Furnished cubicles, which the occupant could lock were available at a charge of 1*s.* a night for over two hundred and fifty men and employees often resided there for substantial periods. There were recreation rooms, baths and lavatories and a canteen which was open also to non-resident employees.

Held that the premises were occupied by the railway company, through the occupants of the cubicles, as a dwelling-house and so should be excluded from the railway valuation roll under s. 1, sub-s. 3 of the Railways (Valuation for Rating) Act, 1930, as not being a "railway hereditament."

Decision of the Railway and Canal Commission (sub nom. *In re an Appeal by Great Western Ry. Co.*) 176 L. T. 275, reversed.

APPEAL from the Railway and Canal Commission.

This was an appeal by the appellants from an order of the Railway and Canal Commission dated February 4, 1947, allowing an appeal brought under s. 11, sub-s. 2 of the Railways (Valuation for Rating) Act, 1930, by the respondents against the decision of the appellants to exclude, as not being or forming part of a "railway hereditament" for the purposes of the third railway valuation roll made under the Act, certain premises consisting of the staff hostel and canteen at Didcot station with its annexe and extension and the staff hostel and canteen at Newbury Racecourse station. The facts are fully set out in the opinion of Lord Thankerton.

Simes K.C. and *Scholefield* for the appellants.
Fitzgerald K.C. and *Patrick Browne* for the respondents.

THE HOUSE took time for consideration.

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* *Present:* LORD THANKERTON, LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

Dec. 5. LORD THANKERTON. My Lords, the appellant authority was constituted by the Railways (Valuation for Rating) Act, 1930, for the ascertainment of values for rating purposes of railway hereditaments in England occupied by a railway company to which the Act applied. As the respondent company's undertaking is wholly in England, I need not refer to the statutory provisions in the case of a railway undertaking which is partly in England and partly in Scotland. In broad terms, the appellant authority's duties under the Act are to prepare quinquennially a railway valuation roll, showing the net annual and rateable value of every railway hereditament in England, and, for the purposes of the preparation of such roll, in the case of each railway company's undertaking, to determine the net annual value of the undertaking as a whole, by ascertaining the average net receipts of the company as directed by the Act, and by then estimating with reference to such receipts the annual rent at which the railway hereditament occupied by the company might reasonably be expected to let as a whole. Thereafter, the appellant authority are directed to apportion the cumulo net annual value of the company's undertaking as a whole among all the railway hereditaments occupied by that company by an apportionment scheme, which requires the approval and confirmation prescribed by s. 13, to which, however, it is unnecessary to refer. In the course of preparation of their third quinquennial valuation roll, the appellant authority completed the part relating to the respondent company's undertaking on February 25, 1944. Subsequently, certain premises were erected by the respondent company at Didcot and Newbury stations for the use of their staff. Before this House, as also before the Railway and Canal Commission, the Didcot premises were alone referred to, as parties were agreed that the same principle would apply in the case of the Newbury premises. I will therefore confine myself to the premises at Didcot. The question between the parties turns on the proper construction of the definition of "railway "hereditament" in s. 1, sub-s. 3, of the Act of 1930, which provides as follows: "For the purposes of this Act . . . . "'Railway hereditament' means, subject as hereinafter "provided, any hereditament occupied for the purposes of the "undertaking of a railway company: Provided that no "premises occupied as a dwelling-house, hotel or place of "public refreshment, or so let out as to be capable of separate "assessment, shall be deemed to be, or to form part of a "railway hereditament." It is to be noted that the proviso excludes from the definition of "railway hereditament" for the purposes of the Act certain hereditaments, though occupied for the purposes of the company's undertaking. It is not disputed that the Didcot premises, with the land on which they are erected, as shown coloured pink on the plan, are a hereditament occupied for the purposes of the respondent company's undertaking, nor is it disputed that the group of buildings form one occupation and one hereditament for rating purposes. Again, it cannot be said that the premises are occupied as a place of public refreshment, or are "so let "out as to be capable of separate assessment," and the only question in this appeal is whether these premises are occupied as a dwelling-house or an hotel. It is therefore necessary to examine the nature of the occupation of the Didcot premises.

The main building, which was opened in May, 1944, is a staff hostel and canteen, which, in addition to the canteen, has recreation, reading and writing rooms, and one hundred sleeping cubicles, with bath and lavatory accommodation, drying room and kitchen; there is also administrative and hostel staff accommodation. There is an annexe, opened in July, 1944, with twenty sleeping cubicles and a workshop. In 1945, four dormitory huts were opened, three of them having forty cubicles each, and the fourth hut having sixteen cubicles and hostel staff accommodation. The total number of cubicles is two hundred and fifty-six apart from hostel staff accommodation. These premises came to be built as the result of the great increase during the war in the traffic handled at Didcot Junction, and the consequent increase in the footplate, locomotive and traffic department staffs, coupled with the shortage of local lodging accommodation. It was essential that sleeping and canteen accommodation should be available for the company's servants who were away from their home stations, and the company at first provided sleeping-coaches and a dining-car, standing in a siding, but that did not prove satisfactory, and the premises here in question were built. The canteen is open to any employee of the respondent company approximately 25 per cent. of the meals being served to employees who are not occupying cubicles. The rest of the premises are only open to men who are occupying cubicles. Only servants of the respondent company who are away from their home stations are allowed to occupy cubicles. Such men may be able to return to their homes for the week-end, or when on leave. The cubicles are separated by breeze block walls, which go to the ceiling, and entirely shut in each cubicle. The cubicles are furnished with furniture provided by the Ministry of Works; the occupant has a key and can leave his personal belongings there; the manager of the hostel has a master key, so as to enable the necessary cleaning to be done by the hostel staff. A charge of one shilling a night, collected either weekly or fortnightly, is made for the occupation of a cubicle. The canteen has its own moderate charges, but the canteen and hostel are run at a loss by the respondent company. There are printed regulations for behaviour in the hostel, but these do not appear materially to affect the present question. As regards permanency of occupation, on which some stress was laid in the judgments appealed against, it may be looked at broadly. The manager of the hostel produced a table, showing the number of changes in occupancy of the cubicles since the opening of the buildings up to December 15, 1946. For this purpose, I will treat the hostel, opened on May 3, 1944, and the annexe, opened on July 24, 1944, as having been open for two and one-half years in December, 1946, and the four huts, opened on dates from April 21 to June 18, 1945, as having been open for one year and a half in December, 1946.

The hostel and annexe, containing one hundred and thirty-three cubicles, during the two and a half years, had nineteen cases of no change, seventy-seven of one change or two changes, thirty-two cases of three or four changes, and five cases of five or six changes. The four huts, containing ninety-six cubicles, during the year and a half had seventeen cases of no change. eighty cases of one or two changes, thirty-seven cases of three or four changes, and one case of five or six changes. It may be added that a considerable number had been accommodated in the sleeping-coaches before transference to these cubicles. The land on which these premises were built had previously been let for grazing, and was not within the definition of "railway "hereditament" and was excluded from the third railway valuation roll. On the subsequent erection of these buildings, the respondent company made a representation to the appellant authority under s. 11 of the Act of 1930, in the case of each erection, that the premises should be included in the roll as a railway hereditament. On July 25, 1946, the appellant authority rejected these representations, and excluded the

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premises from the roll. On appeal by the respondent company to the Railway and Canal Commission, the latter court allowed the appeal, and directed the appellant authority to include the premises in question in their roll. The appellant authority are now appealing against that order.

My Lords, I may say at once, that I quite agree with the Railway and Canal Commission that these premises are not occupied as an hotel within the meaning of the proviso in s. 1, sub-s. 3 of the Act of 1930. An hotel, in my opinion, connotes a building in which an hotel business is carried on, to which the public are entitled to resort for accommodation and refreshment, and to which the edict " nautæ, caupones " would apply. An hotel, so defined, is often contrasted with a lodging-house, sometimes dubbed a guest-house or a private hotel, in which control may be retained over the choice of lodgers to be admitted, and in which there is no obligation to the public generally. There remains the important question whether these premises are " occupied as a dwelling-house " within the meaning of the section. These words " occupied " as a dwelling-house " must be taken as being used in their ordinary meaning, unless the context shows an intention to use them in a different meaning. There was some suggestion that they had such a special meaning here ; I will deal with these suggestions later, and give my reasons for their rejection, and for reading these words in their ordinary meaning. My Lords, I am of opinion that these premises are undoubtedly occupied by the respondent company, through the occupants of the cubicles, as a dwelling-house. The reason for their provision is two-fold, namely, (*a*) that the members of the staff who use the cubicles are away from their homes, and cannot dwell at home, and (*b*) that sufficient lodging-house accommodation is not available at Didcot. While they are at their work, these members of the staff, in my opinion, may properly be said to dwell or reside in the hostel, or to inhabit the hostel. That most of them so dwell or reside for substantial periods is shown by the figures to which I have referred, and they use these premises in substitution for their home dwelling-houses, which are not available while they are on duty. Wrottesley J. begins by saying that these premises are not in fact a dwelling-house. While I am not prepared to agree with that statement without further consideration, it is not necessary to the decision of the present question, which relates to the character of the occupation, and not directly to the class of the building occupied.

On this question the learned judge says (1): "Nevertheless, "I appreciate the question is not in fact: are these premises a "dwelling-house or an hotel, but are these premises occupied "as a dwelling-house or are they occupied as an hotel? "If dwelling made the premises a dwelling-house, the question "would be answered in favour of the respondents, for they are "dwelt in after a fashion. But so to hold would be to ignore "the word 'house.' It seems to me that these premises are "not occupied as a house, but instead of a house, and, looking "at the object of the Act to which I have referred, we should "not, I think, be astute to extend it to premises which are not "a house and cannot, as I understand it, be used as a house. "It is a kind of barracks which is used to house railway "servants for whom no dwelling-house is available elsewhere." In my opinion, these buildings are houses; Mr. Bodman, in his evidence, refers to them as buildings and to their permanent nature, and they are used as houses to dwell or reside in. This conclusion of the learned judge appears to be influenced by his view that the premises were not in fact a dwelling-house, and by his views as to the object of the Act, to which I will refer later, as they would result in a restriction of the ordinary meaning of these words. Sir Francis Taylor K.C. agreed with Wrottesley J., and observed (2): "I would desire to add "that, in my view, the expression 'dwelling-house' involves "a more permanent intention to abide than is shown to exist "in the present case from the evidence which we have had, "and it involves also the presence of families and of household "goods, and it is not a place from which the occupier is not "reluctant to depart. It is quite true to say, and there has "been evidence of it, that the occupiers, that is, the railway "company's servants, do in fact comply with tests which have "been laid down in other cases. They sleep there and live "there and have recreation there. But the same might be said "of men in barracks and students in hostels. We are not "deciding the question of residence or dwelling but whether, "having regard to the occupation of the buildings in this "case, they are, in fact, on the construction of this statute, "dwelling-houses." With all respect, the learned judge appears to have misdirected himself. It is the question of residence or dwelling that here awaits decision, and not whether these are in fact dwelling-houses and the learned judge's observations on the true question would appear to lead to a conclusion in agreement with the view that I have expressed. As regards the element of permanence of the occupation, it appears to me that the fact that the occupants of the cubicles do reside in the hostel through all the periods of their duty, and do not leave the hostel until their employment at Didcot terminates, provides a sufficient element of permanence. I cannot think that the presence of families and household goods is an essential element affecting the present case. Sir Francis Dunnell concurred, and made no additional observations on the "dwelling-house" question.

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(1) (1947) 176 L. T. 275, 277.

(2) Ibid. 278.

The only passage in which Wrottesley J. refers to the object of the Act of 1930 appears to be as follows (1): "This Act "deals with the railway companies' undertakings as they "existed in 1930, when all the railway companies owned, "I suppose, hundreds, if not thousands, of dwelling-houses. "Of the dwelling-houses owned by railway companies very "many were, I suppose, occupied as dwelling-houses, and I "think all parties are agreed on that as being the fact in 1930. "So that upon all such dwelling-houses used as such the proviso "has effect and classifies them. It may, I think, be said that "all hereditaments occupied by the railway company either "are or are not railway hereditaments. Such premises "occupied as dwelling-houses are dealt with by the proviso "and would be, even though they were occupied for the pur"poses of the principal undertaking." No one need dispute that dwelling-houses, owned by the railway company and occupied as dwelling-houses, though occupied for the purposes of the undertaking, are excluded from the definition of railway hereditaments by the proviso. They would equally have been excluded if the proviso had begun with the words "provided "that no dwelling-house," and it should be assumed that an enlargement of the excluded class was intended by the insertion of the words "premises occupied as." I have no reason to suppose—if it were material—that staff hostels owned by railway companies were not in existence in 1930. There was certainly one in existence in April, 1931: cf. *London & North Eastern Ry. Co.* v. *Brentnall* (2). These observations of the learned judge are not inconsistent with the proviso including other premises besides those referred to by him, provided they are "premises occupied as dwelling-houses." But, in any event, the Act of 1930 rests upon a new definition of what constitutes the railway undertaking to be valued by the

(1) 176 L. T. 275, 277.

(2) [1933] A. C. 489.

appellant authority, and any prior practice cannot justify any limitation of the clear language of the Act of 1930. This also affords an answer to the contention put forward by counsel for the respondent company, that the Act of 1930 preserved by means of the proviso to the definition of a railway hereditament the distinction drawn under the practice prevailing before 1930 between hereditaments whose receipts directly or indirectly enable the railway company to carry on the undertaking as a railway and those which do not do so. My Lords, the authoritative opinion of Lord Hailsham L.C., unanimously concurred in by the other noble and learned Lords, in *Railway Assessment Authority* v. *Southern Ry. Co.* (1), states the position in this matter under the practice prior to the Act of 1930, and under the Act of 1930. He says, with regard to the earlier practice (2): " So far as the railways were concerned, " the method adopted was to divide the undertaking into those " portions which were regarded as directly productive of profit, " such as the permanent way, and those portions which " were regarded as only indirectly productive, such as stations " and other hereditaments of that kind," and he went on to point out that the latter were usually valued on " the contractor's basis," and the former on " the profits basis." After pointing out that the provisions of sub-s. 1 of s. 4 of the Act for arriving at the net annual value of the company's undertaking as a whole is on the same basis as had been previously applicable, Lord Hailsham L.C. stated (3): " The " only substantial difference from the old system is the provision " that the annual value of the whole undertaking shall be " ascertained as a whole and shall then be apportioned between " the different parishes, instead of attempting to ascertain the " earning capacity of each part of the railway line lying within " a particular parish, as was done in pre-war days. The new " method also does away with the necessity of drawing a " distinction between directly and indirectly productive parts " of the undertaking and calculating the rateable value of the " indirectly productive parts of the undertaking in each " parish upon the ' contractor's basis '." Lord Hailsham L.C. was there discussing the valuation of the undertaking as a whole by the appellant authority under s. 4, the hereditaments excluded by the proviso in the definition of a railway here-

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(1) [1936] A. C. 266.

(2) Ibid. 274.

(3) Ibid. 279.

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ditament having already been excluded from consideration by the appellant authority.

The proviso to the definition of a railway hereditament has no reference to receipts or profits, or to the hereditaments " being directly or indirectly productive "—a distinction which has disappeared—nor does the proviso contain anything which can be held either expressly or impliedly to refer to the receipts from the hereditaments being such as to enable the undertaking to be carried on as a railway. I am, therefore, unable to find any justification for attaching to the words " premises occupied as a dwelling-house " a meaning other than their ordinary meaning, as to which I have already stated my views. I should add that a number of cases were cited at the hearing of this appeal, but none of them, in my opinion, are of any material assistance. I propose that the appeal should be allowed, that the order of the Railway and Canal Commission dated February 4, 1947, be set aside, and that the appeal by the present respondent to the Railway and Canal Commission against the determination of the present appellant authority in regard to the staff hostel and canteen at Didcot station and the station staff canteen and hostel at Newbury, should be dismissed. The respondent company should pay the appellant authority's costs of this appeal and the costs of the appellant authority and of the Berkshire County Valuation Committee before the Railway and Canal Commission.

I have also to state that my noble and learned friend, Lord Normand, concurs in the opinion which I have just delivered.

LORD SIMONDS. My Lords, I concur.

LORD MORTON OF HENRYTON. My Lords, I also concur.

LORD MACDERMOTT. My Lords, I also agree.

Appeal allowed.

Solicitors for appellants: *Torr & Co.*
Solicitor for respondents: *M. H. B. Gilmour.*

[HOUSE OF LORDS]

H. L. (E.)*

1947

July 1, 3, 4, 7, 8; *Oct.* 30.

LIVERPOOL AND LONDON WAR RISKS ASSOCIATION, LIMITED . . . APPELLANTS;

AND

OCEAN STEAMSHIP CO. LIMITED . RESPONDENTS.

[THE PRIAM]

Insurance (marine)—War risks—Damage to ship—Consequences of warlike operation—Effect of heavy seas on deck cargo—Liability of underwriters.

A vessel insured against war risks and the consequences of warlike operations was, while under requisition by the Crown, directed to carry a cargo of high military importance by a prescribed route across the North Atlantic in December. On the ground of military urgency, part of the cargo, including two cases of aeroplane bodies and a tank bridge-layer weighing twenty-one tons, was carried on the foredeck. The vessel encountered heavy weather with the result that the cargo on the foredeck broke loose and damaged the hatch covers so that No. 2 hold was flooded, and the vessel was down by the head. The master, in order to avoid the possibility of a submarine attack nevertheless maintained a zigzag course at as high a rate of speed as he deemed safe during the storm. In the result further damage ensued. The rivets of the mounting of the gun, fitted for the vessel's protection on the forecastle, were loosened, and water percolated into the forepeak compartments here and through other apertures. There was also heavy weather damage in the region of the after well deck. In a claim against the insurers in respect of the damage done, the shipowners alleged that it was attributable to the consequences of a warlike operation.

Held that the shipowners had discharged the onus resting on them in regard to the damage at No. 2 hold and had shown that it was caused by a war risk, not simply because it was sustained while the vessel was on a warlike operation, but because an integral element of the operation, viz., the carrying of war stores on deck, involved a specific and special war peril and the loss resulted therefrom. The remainder of the damage, however, was solely caused by the heavy weather and no complicating circumstance which could be classed as a war risk contributed to it, since the method of progress adopted was common to all vessels in war-time, whether engaged in a warlike operation or not.

While a vessel in war-time sailing from one war base to another

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* *Present:* LORD THANKERTON, LORD WRIGHT, LORD PORTER, LORD UTHWATT and LORD NORMAND.

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with a cargo of war stores is engaged on a warlike operation, it does not follow that every loss which occurs on such a voyage is to be treated as a war loss.

Yorkshire Dale Steamship Co. v. *Minister of War Transport* (*The Coxwold*) [1942] A. C. 691, explained.

Decision of the Court of Appeal (sub nom. *Ocean Steamship Co., Ld.* v. *Liverpool and London War Risks Association, Ld.*) [1946] K. B. 561 varied.

Appeal from the Court of Appeal (Scott, Tucker and Bucknill L.JJ.)

The facts summarized from their Lordships' opinions were as follows: By a policy of marine insurance in the ordinary form signed on May 6, 1943, the respondents' new motor-vessel, the *Priam*, was insured by the appellants. She was valued in the policy at 807,800*l*. The period covered by the policy was originally June 30, 1942, until September 29, 1942, but was later extended to December 29, 1942. By cl. 1 it was provided: " This insurance is only to cover the risks (in the " policy referred to as 'King's enemy risks') of capture, " seizure, arrest, restraint or detainment by the King's enemies " and the consequences thereof, or of any attempt thereat; " also of the consequences of hostilities or warlike operations " by or against the King's enemies whether there be a declar- " ation of war or not; but excepting civil war, revolution, " rebellion, insurrection and civil strife arising therefrom and " piracy." By cl. 7B: " If the ship is requisitioned by or on " behalf of His Majesty . . . . this policy shall so long as the " requisition remains effective have effect subject to the " following modifications, that is to say: (1.) Notwithstanding " anything contained in cl. 1 hereof this policy shall extend to " cover not only King's enemy risks but also war risks as " hereinafter defined . . . (3.) 'War risks' means (A) the " risks of war which would be excluded from an ordinary " English policy of marine insurance by the following, or " similar, but not more extensive clause: 'Warranted free " 'of capture, seizure, arrest, restrain or detainment and the " 'consequences thereof or of any attempt thereat; also from " 'the consequences of hostilities or warlike operations, " 'whether there be a declaration of war or not, civil war, " 'revolution, rebellion, insurrection or civil strife arising " 'therefrom or piracy.' (B) Loss of or damage to the ship " caused by (i.) hostilities, warlike operations, civil war, revolu- " tion, rebellion, insurrection or civil strife arising therefrom;

"(ii.) mines, torpedoes, bombs or other engines of war." In respect of marine risks the respondents were their own insurers. The *Priam* was a twin screw vessel of 10,029 gross tonnage, 486 feet in length and 66 feet beam. Her speed was 17½ knots at 105 revolutions. In the very head of the ship was placed a 12-pounder gun raised above the forecastle by supporting pillars which were rivetted to the deck. Below there were several compartments known as the forepeak. In the forecastle and the forepeak there were four store rooms forward, one below the other. The windlass motor room was aft of the uppermost store, with the chain locker beneath it. Below all these compartments was the forepeak tank. Aft of the windlass motor room in the forecastle was the crew's galley. At the after end of the forecastle was the forward well deck in which was No. 2 hatch opening into No. 2 'tween decks and lower holds. At the after end of the forward well deck was the centre castle and aft of that was the after well deck in which hatches Nos. 5 and 6 were situated. Beyond that was the poop. The ship was requisitioned by the Minister of War Transport. On the voyage in question she was loaded with a full cargo of about 6,846 tons. Of this 78.5 per cent. were war stores needed for the war in North Africa. Before the trial it was agreed between the parties that the appellants would accept for the purposes of these proceedings that the *Priam* was at all times engaged on a warlike operation, since she was proceeding from one war base to another and the great bulk of her cargo consisted in war stores. On the starboard side of the forward well deck abreast of No. 2 hatch there was stowed on deck a bridge-layer tank weighing 21 tons. Similarly there was stowed on the after well deck a Crusader tank on the starboard side of No. 6 hatch. Large cases of planes were stowed over each hatchway except No. 1. There was a quantity of contact fuses and land mines in the holds. Normally no deck cargo would have been carried at that season. The voyage in question was the ship's second voyage. She was proceeding from Liverpool to Alexandria which was then a principal war base in the Mediterranean. She was directed by the Government to sail, like any other British ship, north of Ireland via the Clyde, then slightly north of west until she reached 30 to 35 degrees west, then south, keeping west of the Azores, round the Cape of Good Hope and up the west coast of Africa. (This would have been, in peace-time, an abnormal route but it was necessitated by the conditions then prevailing in the Mediterranean.) Again, like any other British ship, she was under orders to zigzag and to proceed without lights. She left Liverpool on December 2, 1942, sailing on the prescribed course, not in convoy, her speed being considered sufficient protection. Her draught was then 28 feet 4 inches forward and 30 feet 9 inches aft. She sailed from the Clyde on December 5, and ran into a storm on December 7; there followed a period of exceptionally heavy weather which the master described in a letter dated December 20, 1942, as " the longest period of " severe gales I've ever experienced during my forty years at " sea." The succession of gales lasted from December 7 to 12. The narrative of that period was recorded day by day in the master's reports and in the deck log. On December 8 the vessel hove to at 4 a.m. At 11 a.m. " the cases of planes " stowed on No. 2 hatch began to 'sea-saw' across the tarpaulins, having been struck by a sea which caused the " wood cases to partly collapse and thus slacken the lashings." At 6 p.m. the vessel hove to again. The tarpaulins on No. 2 hatch were now seriously damaged. Early on December 9 the 21 ton bridge-layer was adrift on the starboard side of the deck; the wings had evidently come in contact with the tarpaulins and cut them. The cases on No. 2 hatch were further damaged and several hatches were off. At 8 a.m. the master wore ship and commenced securing the hatch and deck cargo. The bridge-layer was secured in its original position and No. 2 hatch was refitted with spare hatch covers and securely battened down with 'tween deck tarpaulins belonging to other hatches, with the No. 2 'tween deck tarpaulin over all. In the morning the sounding in No. 2 hold showed about 11 feet of water. At 6 p.m. the sounding was 10 feet. It was found that the bilge suctions were being constantly choked with waterlogged wood shavings from broken packages, so that the pumping in No. 2 hold produced poor results. On December 10 it was reported that " the windlass motor " room had been flooded and that the windlass and fore deck " winches would be out of commission for a considerable time. " The electrical equipment including spares in the motor room " had been saturated with sea water. Owing to both canvas " chain pipe covers having split (leaving the lashings round the " pipe coamings) the wood plugs having washed away much " water found its way into the peak. Also water leaked into " the motor room, through damaged rivets holding down the " gun mounting." The sounding in No. 2 hold was now

8 feet. On December 11 the master wore ship to enable him to secure the deck cargo at No. 2 hatch. Later the vessel hove to. At 4.0 p.m. the wind had increased to a whole gale with frequent squalls of hurricane force and there was an extremely rough, high, dangerous sea with an exceptionally high, confused swell. In the morning the sounding of No. 2 hold was not obtainable. Soundings after noon were 6 feet 5 inches and 7 feet 2 inches. On December 12 the day began "with a whole W.N.W. gale, with squalls of hurricane force "and a very high cross S.W./N.Wly. sea and swell . . . . "About 2.30 a.m. it was seen that the 21 ton bridge-layer was "again adrift having crashed across No. 2 hatch . . . . "At 3.0 a.m. I 'wore ship' . . . . When dawn came it was "seen that the bridge-layer had crashed across the hatch and "stripped completely the after end of about two and a half "sections of hatch covers with the fringe of the destroyed "tarpaulins still secured behind the battens. The water was "seen to be swirling about No. 2 'tween decks and a sounding "of 32 feet 6 inches of water was in the hold. Looking into "the hatchway revealed a mass of debris from battered tanks, "some badly dented and others with caterpillar belts and "wheels torn off, damaged bren carriers, etc., surging across "the 'tween decks which was littered with detonators. "Packages of smaller cargo were smashed to pulp . . . . "Although the ship was steering well . . . . heavy seas were "being shipped over the centre-castle and pouring down the "after end of No. 2 hold. By now the ship was very much "down by the head, the foredeck completely awash with seas "pouring over both rails . . . . The weather was now moderating; the officers and men finally succeeded in replacing the "hatch covers with spares from the centre castle . . . . The "bridge-layer was now secured . . . . It was not safe to " . . . . steer for Fayel; there was no option but to go on to "San Miguel . . . . At 11.0 p.m. I arrived off Port Delgado "where there was no shelter from westerly winds whatever. "The vessel was 'hove to' . . . . within the three mile limit." On December 13 at 8.0 a.m. it was found impossible to enter the harbour and the ship proceeded along the south side of the island finding a lee about 1½ miles off shore about 2 miles in length. Here she cruised all day. The gale had now reached hurricane force with terrific squalls and torrential rain. At 4.0 p.m. the wind shifted and the weather cleared. At 6.0 p.m. the weather was moderating. From the report of

the chief engineer it appeared that, at some time which was not precisely specified, the water filled the chain locker and forepeak cabin; that it came through the forward door of the windlass room and also that it entered the forward winch contactor house, forward of No. 2 hatch. From the evidence it appeared that water entered the forepeak partly through the ventilators and air holes and possibly also by the doors on either side of the crew's galley aft of the motor windlass room. During part of this period the foredeck was awash, the three forepeak store compartments and the forepeak tank being full of water and the ship being first about 3 feet and later about 11 feet down by the head. At one time there were over 2,200 tons of water in No. 2 hold. On the after well deck the Crusader tank did not break loose but here and on the centre castle deck and poop there was damage owing to their having been continuously swept by heavy seas. As regarded the damage to the after well deck, and poop, the master said in evidence that the condition of the ship probably protected rather than exposed this part, since she would be higher out of the water there and less exposed to injury. As to the handling of the ship, it appeared from the master's evidence that throughout the storm he continued to zigzag so far as he was able to do and to drive the ship forward at such speed as he deemed safe. He feared torpedo attack and therefore continued to press on and to zigzag under conditions in which, in peace-time, it would have been possible to wear ship or heave to, keeping his ship's head to the wind, or, where he did not deem that action necessary, he would have reduced speed sooner and more drastically and then no damage would have occurred. Reporting he wrote: "At no time was the vessel recklessly driven "during bad weather. In fact the speed was so much reduced "at times to preserve the deck cargo and security of hatches "that I felt in grave danger from submarines." This fear made him keep up the engine revolutions when otherwise he would have reduced speed. There was no evidence of the actual presence of submarines. At Freetown it was found necessary to re-stow the cargo in No. 2 hold by reason of the disturbance of the stowage created by the heavy weather. Other damage sustained by the same cause was also put right. The respondents' claim for ship damage against the appellants amounted to 1,632*l.* 10*s.* 10*d.* If was agreed that only questions of liability should be dealt with at the trial. Atkinson J. gave judgment for the respondents for an amount to be ascertained excluding the damage to the gun platform and mounting. The Court of Appeal having held that the whole of the damage was recoverable, the appellants appealed to the House of Lords.

Sir Valentine Holmes K.C., *Devlin K.C.* and *Hubert Parker* for the appellant. The questions for determination may be formulated as follows: Was the damage by heavy weather a consequence of the warlike operation? Were there circumstances which brought this damage within the category of consequences of a warlike operation? What was the warlike operation? Was the damage caused by it? Damage solely caused by heavy weather is not a consequence of a war risk. It is recognized that in some cases circumstances may be present, in addition to heavy weather, which so contribute to the loss as to render it the consequence of a warlike operation but no such circumstances are present here, and there is no authority to drive the House from the conclusion that this is not a case of a war risk. It is not every damage sustained by a ship engaged on a warlike operation that is a consequence of that operation: *Attorney-General* v. *Adelaide Steamship Co., Ld.* (*The Warilda*) (1). If such a ship by her own action causes the loss it will not be a consequence of the warlike operation unless that action was taken with the dominant object of fulfilling the operation. If a ship proceeding through smooth water from one war base to another was involved in a collision or stranded that would not be a case of a war risk but if she were taking some step the dominant object of which was to avoid a war risk (e.g., a submarine which she had sighted) the case would be different. The test is the immediate object of the action taken, whereas if all that was required was that the object of the activity should be for the ship to get to her destination with a war cargo everything would be a war risk and no line could be drawn anywhere. In the present case all that the ship was doing was trying to avoid the blows of the weather. The damage was proximately caused by the exceptional violence of the winds and the waves and accordingly the loss was due to a marine peril. Heavy weather is not in the same category as collision or stranding in relation to warlike operations. In *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (2) the decision would have been different if the master had known of the proximity

(1) [1923] A. C. 292, 305. (2) [1942] A. C. 691.

of the rocks and a storm had driven the ship on to them while he was trying his best to keep her off; the loss would then have been due to a marine peril. The *Priam* was running the same risks as any other ship then engaged on a commercial venture and there was nothing to connect the loss with a warlike operation. Even if the presence of the deck cargo was the proximate cause of part of the damage that does not decide the case against the appellants, for the carriage of such a deck cargo in war-time was not necessarily a warlike operation. Carriage of cargo on deck was a condition which shortage of tonnage in war-time imposed on peaceful ships as well as those engaged in warlike operations. The fact that this deck cargo happened to consist of engines of war is irrelevant. Similarly the infiltration of water into the forepeak was due to the necessity of driving the ship forward regardless of the weather and so navigating as to guard against the general menace of submarines and this necessity likewise affected all ships at that time. Even assuming that the stowage of the cargo on deck constituted a warlike operation, the position still was that there were two causes of the loss and that one of them was the heavy weather, which was a marine risk. The heavy weather was a cause common to the whole damage sustained but the deck cargo was not and only contributed to the damage in the sense that it merely increased the marine peril: see *Britain Steamship Co., Ld.* v. *The King* (*The Petersham*) and *Green* v. *British India Steam Navigation Co., Ld.* (*The Matiana*) (1). On the true construction of the phrase "consequences of hostilities or warlike operations" in the policy, the word "consequences" means effects or results of hostilities or warlike operations, while acts done for the purposes of hostilities or warlike operations are not included: see *Britain Steamship Co., Ld.* v. *The King* and *British India Steam Navigation Co., Ld.* v. *Green* (2). Carrying the deck cargo was not a peril; the peril was the heavy weather—just as going out without an overcoat is not a peril; the peril is catching cold. [They referred to *Ionides* v. *Universal Marine Insurance Co.* (3); *Attorney-General* v. *Ard Coasters, Ld.* (4); *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (*The Geelong*) (5); and *Clan Line Steamers, Ld.* v. *Board of Trade* (*The Clan Matheson*) (6).]

(1) [1921] 1 A. C. 99.
(2) [1919] 2 K. B. 670, 692, 693.
(3) (1863) 14 C. B. (N. S.) 259.
(4) [1921] 2 A. C. 141.
(5) [1923] A. C. 191.
(6) [1929] A. C. 514.

Willink K.C. and *A. J. Hodgson* for the respondents. This voyage, viz., the passage of the ship through the water, was a warlike operation and all the damage sustained by a ship in the performance of a warlike operation is a consequence of the warlike operation, even though she be merely passive when damaged by the weather. It is true that loss by heavy weather is prima facie a loss by a peril of the sea but in such a case as this the plaintiff may show (*a*) that there was some species of warlike operation in progress and (*b*) that that operation or some part or incident of it was the cause or part of the cause of the damage—an essential and necessary part of the direct and immediate cause of the damage. That assumes that the cause may be considered as having parts. The Court of Appeal was right because one proximate cause of all the damage lay in the acts of those on board the ship, in her navigation and management while she was sailing on a warlike operation which was at all times in progress and which included as one of its characteristics the carriage of a hazardous deck cargo. This was a peril which the policy covered. The ship was, it is true, battered by heavy weather but the damage was caused by the circumstances of the voyage, the danger of submarines, the route prescribed, the zigzagging. The damage could all have been avoided by heaving to. The storm would have represented no danger to this modern ship had the master been free to behave normally. But the method of navigation imposed meant strains forward, heavy seas washing over all the superstructure and very bad rolling. The ship was loaded most abnormally for a December voyage. The deck cargo was taken aboard because of war-time conditions and broke adrift, thus aggravating the situation. With a view to minimizing the risk of submarine attack and the loss of a fine ship and her war stores, she had been ordered to an area where the risk of heavy weather damage was enormously increased and there she was navigated under orders from the master, with a view to her safety and that of the cargo, in such a way as to speed, continuity of movement and changes of course as to increase the risk of damage and that damage was thereby caused in the course of the heavy weather. All the time submarines were an ever present menace and it is irrelevant whether or not the master's suspicions as to their actual proximity were well founded. All these matters were no business of the insurers against marine risks. The scheme of insurance is that all the risks are meant to be covered, the marine risks by a marine insurance policy, and the risks excluded from that policy by the war risks policy. Now, in a marine policy war risks are excluded and if a loss is caused even in part by a war risk, it is not covered by that policy. Accordingly when there are two proximate causes of the loss, both concurrent and both effective, that case must be covered by the war risk policy, which, though it is not an insurance against perils of the sea, does not contain any provision excluding loss by perils of the sea. It is of no avail for the war risk underwriters to show that perils of the sea are in part the cause of the loss, because they have not excluded liability for losses so caused when there is more than one proximate cause. It was a possibility which the war risks policy did not envisage. It is only necessary to discover whether there was a loss by the risk insured against. The question is : Was the loss in a practical sense the result of the prosecution of a warlike operation ? It was, because the acts of those on board were in a business sense the cause of all the damage. The judgment of the Court of Appeal can equally well be supported if those acts were an essential part of the cause in an insurance sense. In such a case as this heavy weather is not in a different category from stranding or collision, for the ship was an active participant in causing the damage ; she did not merely suffer the blows of the weather : see *Clan Line Steamers, Ld.* v. *Board of Trade* (*The Clan Matheson*) (1) and *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (2). As to the construction of the phrase " consequences of hostilities or warlike oper- " ations," the word " consequences " does not mean the effects or results of those hostilities or warlike operations but is descriptive of a peril or risk, so that every act or thing done for the purposes of hostilities or warlike operations constitutes a specific war peril, and reading " consequences " in this sense it is as if the insurance were expressed to be against " loss " caused by the consequences of hostilities or warlike " operations," so that the use of the word " consequences " extends the cover afforded. As to the damage suffered, this may be divided into three classes (*a*) that caused to the forward well deck and No. 2 hold through the cargo coming adrift ; (*b*) that caused by water entering the forepeak through the loosening of the gun mounting, through the ventilators and air pipes, through the hawse pipes, through the forward doors

(1) [1929] A. C. 514.

(2) [1942] A. C. 691.

of the windlass room and the doors on either side of the crew's galley and (*c*) that caused to the after well deck and the poop. [They referred to *Ionides* v. *Universal Marine Insurance Co.* (1); *Britain Steamship Co., Ld.* v. *The King* (*The Petersham*) and *Green* v. *British India Steam Navigation Co., Ld.* (*The Matania*) (2); *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (*The Geelong*) (3); *Reischer* v. *Borwick* (4); *P. Samuel & Co., Ld.* v. *Dumas* (5); *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (6); *Attorney-General* v. *Ard Coasters, Ld.* (7); *Attorney-General* v. *Adelaide Steamship Co., Ld.* (*The Warilda*) (8); *Board of Trade* v. *Hain Steamship Co., Ld.* (9); *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (10) and *Athel Line, Ld.* v. *Liverpool and London War Risks Insurance Association, Ld.* (*The Atheltemplar*) (11).]

Sir Valentine Holmes K.C. in reply. The question is: What was the cause of the damage? It is impossible to have two proximate causes of loss in a marine insurance sense. *Reischer* v. *Borwick* (4) did not decide that it was possible. On the evidence this damage was due to the heavy weather and not to the way in which the master handled the ship. [He referred to *Smith, Hogg & Co., Ld.* v. *Black Sea & Baltic General Insurance Co., Ld.* (12) and *The Christel Vinnen* (13).]

THE HOUSE took time for consideration.

Oct. 30. LORD THANKERTON. My Lords, I have had an opportunity of considering the opinions about to be delivered by my noble and learned friends, and I desire to express my concurrence in them.

LORD WRIGHT. My Lords, before the trial it was agreed between the parties that the appellants would accept for purposes of these proceedings the contention that the *Priam* was at all times engaged on a warlike operation since she was going from one war base, Liverpool, to another war base, Alexandria, and the great bulk of her cargo consisted in war stores. The issue in the case has been whether, in the light of that admission, the damages claimed or any part of them were to be treated as in respect of war damage within the meaning of the policy in suit, or were to be regarded as marine damage such as would have been recoverable under a marine policy against perils of the seas in the ordinary form. The issue can be correctly stated in this way though the respondents were in fact their own insurers (to use the common phrase) in respect of marine risks.

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(1) 14 C. B. (N. S.) 259, 284.

(2) [1921] 1 A. C. 99, 114, 131, 133.

(3) (C. A.) [1922] 1 K. B. 706, 711, 715, 719; (H. L.) [1923] A. C. 191, 198, 200, 201, 208.

(4) [1894] 2 Q. B. 548.

(5) [1924] A. C. 431, 467.

(6) [1918] A. C. 350.

(7) [1921] 2 A. C. 141.

(8) [1923] A. C. 292.

(9) [1929] A. C. 534.

(10) [1942] A. C. 691, 696, 698, 699.

(11) [1946] K. B. 117.

(12) [1940] A. C. 997, 998.

(13) [1924] P. 208, 213.

The prima facie cause of all the damage was the exceptionally heavy weather which swept the ship's decks, especially when she was down by the head, so that the worst damage was in the fore part and in particular when the bridge-layer broke adrift, breaking the hatch covers, and thus opened up No. 2 hold to the sea. The Crusader tank on the after well deck did not break loose and though there was some heavy weather damage in that region, it was comparatively slight. It is clearly necessary to distinguish the damage sustained in different parts of the ship because of the difference in conditions operating at different parts of her length. The learned trial judge found that all the damage fell under the war risk policy except the damage to the gun platform which he held should be distinguished. The Court of Appeal held that all the damage was war risk damage, founding on the proposition that the whole adventure was a warlike operation and as was the whole so were the parts. While I agree that it is now settled by a number of decisions in this House and last of all in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (1), that a vessel in war-time sailing from one war base to another with a cargo of war stores is engaged on a warlike operation, It has not been laid down except in general terms that every loss which occurs on such a voyage is to be treated as a war loss. The decisions, as I shall show later, have not gone so far and I should be sorry to extend them without good reason. In the present case I think that the damage in the way of No. 2 hold is, though due to a marine peril, a loss recoverable under the war risk insurance, not simply because it was sustained while the vessel was on a warlike operation according to the now established definition, but because of the particular fact that an integral element of the operation involved a specific and special war peril and that the loss resulted therefrom. This was *the* cause. But I distinguish the damage sustained in the after well deck, because, as I understand the facts, it was solely caused by the heavy seas sweeping over the vessel and there was no complicating circumstance which could be classed as a war risk contributing to the damage in that area. Hence the cause of that damage was a peril of the seas independent of any specific war peril. This involves the simple issue whether damage caused by the onslaught of heavy seas to a vessel engaged on a warlike operation is ipso facto to be classed as war damage or in other words whether a marine peril is excluded from the marine policy if it operates while the ship is engaged on a warlike operation in the conventional sense established by the cases. Lord Sumner in *Attorney-General* v. *Adelaide Steamship Co., Ld.* (*The Warilda*) (1), after stating that by admission the voyage of the *Warilda*, the vessel in question, was a warlike operation throughout, added " and as was the whole so were the parts." But no case, so far as I know, has held that heavy weather loss or damage sustained by a vessel engaged like the *Priam* in what is now technically described as a warlike operation is necessarily a war peril under a policy such as that in suit and is recoverable from the war risk underwriters. Though Lord Sumner's dictum may be true of that other type of sea peril, viz., a collision or a stranding such as is illustrated in *Attorney-General* v. *Adelaide Steamship Co., Ld.* (1) and in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (2), Lord Atkin qualified Lord Sumner's dictum by adding the word " almost." He said : " If the warlike operation includes the " direction of the war vessel [i.e., in the conventional sense] " through the water from one war starting point to another war " destination, it seems to remain true that almost every casualty " to a ship during such an operation will be the consequence of " a war operation. Not all, for there may be circumstances of " accident on board or the result of wind and wave that " may not come within the definition, though I should find it " necessary to know all the facts relating to a suggested " accidental fire or a suggested great wave before I was able to " draw the line. But if in the course of a warlike operation " the direction of the ship's course against another ship is a " consequence of a warlike operation : *Attorney-General* v. " *Ard Coasters, Ld.* (3), it is surely impossible to distinguish

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(1) [1942] A. C. 691.

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(1) [1923] A. C. 292, 301.
(2) [1942] A. C. 691, 700.
(3) [1921] 2 A. C. 141.

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" the case where the course of the ship is directed against a rock " and this whether negligently or without negligence, and " whether the ship is deflected by tide or current or wind." That last sentence contains all that was necessary to decide that appeal, and, I think, states the whole rule in accordance with the authorities which I cited in my speech in the same appeal. I did indeed in that case go beyond the issues before the House and by way of observation not necessary for the decision of that appeal, express doubts whether the same reasoning which has been applied to collision, or stranding or the like could be extended any further beyond the point to which the cases had carried it which is what has now to be decided. I said (1): " It might, indeed, be said that damage by heavy " weather is consequent on the ship moving while executing " her warlike operation to the position where she was damaged " by the heavy sea. In particular, it might plausibly be said " that, if she were deliberately forced at full speed ahead when " a prudent navigator would heave to, or deliberately taken " into the area of a cyclone for some warlike purpose, resulting " damage would be a consequence of warlike operations." I did not there think it necessary further to discuss this contention, plausible though it might appear. The warlike purpose might itself be a war risk. I went on however to point out that the relevant words had not been construed as applying to the impact of water and added (1): " My own view " at this moment is that this absence of precedent is no accident, " but is due to the fact that the hypothetical case is outside " the contemplated purview of the words, however the matter " might be regarded on lines of exact logic." That is still my opinion which I shall later here develop.

I may perhaps find some support for this line of thought in one of the instances given by Erle C.J. in *Ionides* v. *Universal Marine Insurance Co.* (2); the Chief Justice puts the case of a vessel driven into a bay and then getting out on a change of wind but in pursuing her voyage encountering a storm which but for the delay she would have escaped, and being overwhelmed and lost. There, he said, the loss would be due to perils of the seas and not the attempt at seizure. I do not desire unduly to stress these words, because Erle C.J. was directing his mind to questions of remoteness. The other instances he gave were cases of stranding or mines. Willes J., who agreed, observed, in the course of his judgment (3), that, in considering the exception, we can only look at the proximate consequences: he expressly treated the word " consequences " as equivalent to " effects." Later he added (1): " It seems to me that the " loss was a consequence of the perils of the sea, and not a " consequence of hostilities." I quote these words in passing because they seem to me to negative the view of Scott L.J., that (2) " consequences " in the f.c. and s. clause means causes or perils, not effects, and expands the scope of the words. I do not think it would necessarily matter which meaning was given to them, but in my opinion " hostilities " denotes the peril and " consequences " the resulting loss. This I think was the deliberate view of Willes J. though not unnaturally there has been some vagueness at times in the use of these words, perhaps even by the Chief Justice in *Ionides* v. *Universal Marine Insurance Co.* (3). But Willes J. was a great judge peculiarly exact in his use of words. I agree with him. Indeed the authorities conclusively support him. I may note that " consequences " applies also to " warlike operations " in the clause.

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(1) [1942] A. C. 691, 713.

(2) 14 C. B. (N. S.) 259, 286.

(3) Ibid. 289.

On the main issue, however, it seems to me that there is a real difference of substance in this context between the ship striking a rock or colliding and being struck by a sea. It is true that it is while she is pursuing the contemplated warlike operation that the sea strikes her and that her striking the rock or colliding is as little purposed as her being struck by a heavy sea. But in the former case she is an active agent quoad striking the ship or rock, in the latter she is merely passive. I think that this is a sufficient distinction on the authorities for this purpose. The distinction between activity and passivity is emphasized in the *Clan Line Steamers, Ld.* v. *Board of Trade* (*The Clan Matheson*) (4). In that case a vessel not engaged on a warlike operation in the artificial sense of the cases, while she was proceeding in convoy swerved out of line because of a sudden failure of her steering gear and impaled herself on the corresponding vessel in the next line. That vessel was engaged on a " warlike operation." She did thus in one sense run into and sink the " non-warlike " vessel but her warlike operation was held not to be the cause of the other vessel's loss. Nothing she could have done or omitted could have averted the loss. The " warlike operation " vessel was merely passive and equally the vessel which was

(1) 14 C. B. (N. S.) 259, 291.
(2) [1946] K. B. 561, 569.
(3) 14 C. B. (N. S.) 259, 286.
(4) [1929] A. C. 514.

sunk by the collision was merely a passive victim. It was said by Lord Sumner that the latter vessel was a lost ship the moment her steering apparatus failed. That was the cause of the whole casualty; the fact that the lethal blow was struck by the vessel engaged on a warlike operation made no difference. *Attorney-General* v. *Ard Coasters, Ld.* (1) was not applied. War-time conditions do not abolish the distinction between sea perils and war perils. The f.c. and s. clause does indeed remove the war perils from the scope of the marine policy if the war peril is the dominant cause but the marine policy with its obligations, save as so limited, still remains. The discussion in this House on the *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (2), as to heavy weather damage was induced by the judgments in the Court of Appeal which held that the damage in that case, which was a "warlike "operation" case, was due to a marine peril namely stranding, caused by an unexpected current, a specific marine risk. I may quote a few words from the judgment of that distinguished authority on marine insurance, the late MacKinnon L.J. (3): "In the result this seems to me clearly to have been damage "to this ship proximately caused by perils of the seas, and "I do not think that the marine risk underwriters could resist "a claim for that loss by contending that, by reason of the "nature of her cargo and her port of destination, the loss came "within the f.c. and s. clause as a consequence of warlike "operations." If the true effect of the f.c. and s. clause is to exclude every sort of marine damage occurring while the ship was engaged on a warlike adventure then, as it seems to me, the marine policy is simply otiose during that adventure. But no one has gone so far as that. Nor has the category of marine perils laid down by the majority of this House in regard to non-military voyages under war conditions in *Green* v. *British India Steam Navigation Co., Ld.* (*The Matiana*) (4) been abolished while the ship is engaged on a warlike operation, save to the extent that the decisions cited have gone. The vessel concerned in that case, the *Matiana*, was proceeding on a westerly course down the Mediterranean as a trading ship, i.e., not on a warlike operation. But she was sailing in convoy, without lights, zigzagging and on an unusual and unlighted course where the currents were variable, and as directed by the senior naval officer, but all the same the loss of the ship through stranding

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(1) [1921] 2 A. C. 141.
(2) [1942] A. C. 691.
(3) [1942] 1 K. B. 35, 46.
(4) [1921] 1 A. C. 99.

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on the rock was held to be a marine loss. The reasoning was that no one of these features nor their totality constituted war perils. The voyage was not a warlike operation. Zigzagging is an ordinary incident of navigation in war-time conditions and may here be disregarded. This House did indeed unanimously reverse the judgment of the Court of Appeal in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (1) partly on grounds of fact but also on the grounds that the ship stranded while engaged on a warlike operation, that stranding was for this purpose equivalent to collision, and that therefore the decision was governed by express authority. Further than that the House did not decide. Outside of the particular concept of the "warlike "operation" or particular war risks the sea peril remains and must still be held to be the operative peril for which the marine underwriters continue to be liable, except in the case of collision, stranding or the like, due to the ship, a "warlike "operation" ship, being actively directed into the obstacle on her warlike course: for other cases a purely marine loss due to heavy weather must still be held to be the liability of the marine underwriters. It has always been held that the onus to show that a loss which on its face is due to purely marine perils is in truth caused by a war peril and is on the party so maintaining. That onus was discharged in the case of *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (2), where it was clear that though the final cause of the loss was a sea peril, the real cause was a war peril, the final but decisive effect of which was postponed. The same rule applies in the "warlike operation" cases. In my opinion the "warlike operation" cases do not state a general principle applicable to all kinds of damage but have to be applied to the particular classes of fact upon which they proceeded. It is now clear that Lord Sumner's dictum (3) that as was the whole, so were the parts cannot be applied without qualification. It has been corrected by Lord Atkin, with whose opinion I agree.

If I may revert to what Lord Atkin said, two things may be particularly noted. One is that he excluded definitely the idea that all casualties occurring to a vessel engaged on a warlike operation can be regarded as the consequences of the warlike operation; he said *almost* all: secondly, he treated as being the essential distinction whether the course of the vessel is *directed* against another vessel or against a rock. Lord Sumner so far as I can see, would also have accepted as essential this element of direction against a physical obstacle, whether another ship or land. It must not be ignored that any sea damage such as heavy weather damage is a peril of the seas and that, whenever such a claim is brought under a war risks policy for a loss which is prima facie due to a marine risk, the plaintiff " must show " that under the circumstances of the case the damage would " be excluded from the protection " of a marine policy by the f.c. and s. or similar clause. So it was said by Lord Sumner in *Attorney-General* v. *Adelaide Steamship Co., Ld.* (1). That is the well established rule which I only note here because Lord Sumner stated it specifically in regard to a " warlike " operation " vessel and negatived the idea that there is in such case any alteration in the onus or proof. What, however, Lord Atkin was emphasizing was, indeed, that the facts of the particular case must be scrutinized but he also gives a guiding clue. However, I am not clear what particular importance he attached to the question whether the wave was " great." There is a loss by a peril of the sea wherever damage is done by the fortuitous incursion of sea water: so it was held by the Judicial Committee in *Canada Rice Mills, Ld.* v. *Union Marine & General Insurance Co.* (2). I mention this because the unqualified rule that as is the whole so are the parts stated by Lord Sumner might seem to cover any fortuitous accident or casualty of the seas outside the ordinary action of the wind and waves, and so capable of being regarded as a peril. This would indeed place a heavy burden on the war risk underwriters because in this context I can see no difference between a heavy wave and any sea damage so long as the latter comes within the flexible category of perils of the sea. But I do not think Lord Sumner contemplated such a case or was thinking of damage due merely to the incursion of water consequent on a wave, whether great or small, not connected with or motivated by a war risk, as in my opinion was the sea damage in the way of No. 2 hold. I do not regard Lord Sumner's general aphorism as covering such cases at all, or indeed any cases except such as were being discussed in that decision.

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(1) [1942] A. C. 691.

(2) [1918] A. C. 350.

(3) [1923] A. C. 292, 301.

My conclusion, then, is that, on the facts of this case, the respondents have satisfied the onus resting upon them in regard to the ship damage at No. 2 hatch and hold, and that they have shown that it was caused by a war peril, but have failed as to the damage in the after well deck. Still more clearly have

(1) [1923] A. C. 292, 301. (2) [1941] A. C. 55.

they failed as regards the damage to the gun platform which was erected on supports riveted to the forecastle deck, right in the head of the ship. The carriage of this small gun, merely for defensive purposes, was not in itself a warlike operation. What happened was that in the heavy seas the rivets started and water came into the motor room, which became flooded. This, it seems, was before the flooding of No. 2 hold, which, of course, put the vessel's head down. The damage was purely sea damage. The store rooms in the forepeak also flooded. The precise facts are not very clear, but it is perhaps enough to say that all the forepeak damage was either simply sea damage or that at least it is not proved that any element of warlike operation contributed to that damage and hence the loss should not, in my opinion, fall on the war risk policy. The same is I think true of the minor damage in the after part of the ship. In the result my conclusion is that, except the damage to the ship in or in the way of No. 2 hold, the remaining other items of damage are not recoverable from the war risk underwriters and so far the appellants succeed. I may add that I do not find (if it is material to find) that the master was driving the ship recklessly during bad weather. He says expressly in his report to his owners that at no time did he drive the vessel recklessly. He adds: " In fact the speed was so " much reduced at times, to preserve the deck cargo and " security of hatches, that I felt in grave danger from sub- " marines." There was no evidence of actual submarine danger. His log, which has been carefully examined, and his evidence confirm this statement, which I accept. That complication, for what it was worth, need not therefore be considered. He wore ship or hove her to frequently, whenever he thought it necessary and I am sure his judgment was sound. But, as I have already said, I do not regard this question as material in a case like this.

On the whole case, I should affirm the judgment of both courts below in regard to the ship damage at No. 2 hatch and hold, and hold that this damage was due to a consequence of the warlike operation on which the vessel was engaged. As to the other heads of damage, Atkinson J. was not satisfied that the damage to the gun platform was in consequence of the warlike operation but thought it was caused by the marine perils. I agree with him. But the same is true of the other heads of damage to which I have referred, as to which my conclusion is either that they were not caused by the war operation or at least have not been shown to have been so caused. The result is that in my judgment the decision of the Court of Appeal appealed from should be varied by holding the respondents liable in respect of all the ship damage other than that at No. 2 hatch and hold. I have read the order which my noble and learned friend on the woolsack is about to propose, and I agree with it.

LORD PORTER, My Lords, this case raises once more the much debated question what risks are insured under a policy of marine insurance covering the consequences of hostilities and warlike operations.

Undoubtedly the master feared torpedo attack and therefore continued to press on and to zigzag under conditions in which, in peace-time, he would have heaved to, keeping his ship's head to the wind or, where he did not deem that action necessary, would have reduced speed sooner and more drastically than he did. But, as he says, "at no time was the vessel "recklessly driven during bad weather. In fact the speed "was so much reduced at times, to preserve the deck cargo "and security of hatches, that I felt in grave danger from "submarines." It was this fear and no haste to bring his cargo to its destination which made him keep up the engine revolutions at times when otherwise he would have reduced speed. In other words, he followed the same practice which any merchant seaman would have done in war conditions whether he had been in command of a ship carrying war stores or engaged in an ordinary commercial venture.

In submitting his case Mr. Willink very conveniently divided the damage suffered into three classes: (1.) that caused to the forward well deck and No. 2 hold, which was directly attributable to deck cargo coming adrift and either causing damage by contact or stripping the hatch covers so that water got into the holds; (2.) that caused by water getting into the forepeak and chain locker, windlass motor room and upper store. This water, it was submitted, and the evidence appears to bear out the submission, entered (*a*) through the started rivets of the gun platform; (*b*) through the ventilators and air pipes; (*c*) through the washing away of the plugs and the splitting of the canvas covers of the hawse pipes; (*d*) through the forward doors of the windlass room, and (*e*) possibly through the doors on either side of the crew's galley; (3.) that caused to the after well and poop. This last mentioned damage was admitted not to be due to the ship being down by the head but was attributed by the master to heavy weather, to zigzagging and to changing his position in order to avoid the risk of being torpedoed. It was, I think, conceded by the respondents that the second head of damage was not necessarily due to the ship being down by the head. In any case, the result of the evidence appears to be that the time of its occurrence has not been established and it may as well have occurred before as after the water was admitted to No. 2 hold. It was, therefore, unconnected with the carriage of the deck cargo on or abreast of No. 2 hatch and like the damage done to the after well deck was heavy weather damage possibly caused and at any rate accentuated by the zigzagging and the driving of the ship through the seas in order to lessen the danger of being torpedoed. The claim to recover these two heads of damage may, therefore, as I think, be treated as subject to the same considerations and determined on the same principles.

The *Priam* was under requisition and therefore cl. 7B of the policy applies. It will be observed that that clause first of all insures the risks deleted from an ordinary marine policy by the f.c.s. clause and then goes on to insure those very risks positively. The material words for your Lordships' consideration are "consequences of hostilities or warlike "operations" and the policy first covers risks taken out of the cover given under the marine policy by the exception of those risks and then covers those risks eis nominibus in the succeeding sub-clause. I do not myself regard this fact as material. Whether either or both of these forms is adopted I think the cover effected is the same i.e. against the consequences of hostilities or warlike operations. I may add, as has often been said of the two expressions, "warlike operations" is the wider and it is probably simpler to confine one's attention to that expression. But, in order to deal with one aspect of the case discussed in the court below, I propose to assume without deciding that the words "consequences of" precede and apply to "warlike operations" as well as to "hostilities." It was argued by the respondents, and accepted, I think, by Scott L.J. that the insurance was against "the consequences of hostilities "or warlike operations" and not confined to loss caused by hostilities or warlike operations, i.e., that the consequences were a risk and not a loss. It was said, therefore, that the insurance covered such risks as would have been covered if the wording ran "this policy is against loss caused by the con-

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"sequences of hostilities or warlike operations." I presume the result of this reading of the clause would be—at any rate it was submitted to be—that the cover would embrace a more remote loss than would be covered if the words "consequences "of" were omitted. Even apart from authority I should not so read the language. When one finds an insurance first against *the exception of the consequences of hostilities and warlike operations* and in a succeeding clause against *hostilities and warlike operations*, the words "the consequences of" being in this second case omitted, I should myself construe the two expressions as intended to cover the same thing.

When, moreover, the authorities are considered I think they support this view. The historical development of the phrasing of the exceptions clause is to be found in the judgment of Atkin L.J. as he then was, in the *Britain Steamship Co., Ld.* v. *The King* (*The Petersham*) and *British India Steam Navigation Co., Ld.* v. *Green* (*The Matiana*) (1). Starting with "free of capture and seizure," it had become "free of capture, "seizure and of hostilities or the consequences thereof," by 1863. In 1883 "warlike operations" was added and the clause reached its present form. Consequences, then, combined with hostilities has been in use since 1863 and was construed by both Erle C.J. and Willes J. in *Ionides* v. *Universal Marine Insurance Co.* (2), the former pointing out that the consequences must be proximate in the legal sense of that word and the latter saying (3): "It has been argued that the "ordinary rules of insurance law are not applicable to this "policy, by reason of the words of the warranty all conse-"quences of hostilities . . . . I apprehend it is a fallacy to "say that a larger sense is to be given to this exception by "reason of the use of the word 'consequences' than if the "word used had been 'effects.' In construing the exception, "we can only look to the proximate consequence of hostilities. ". . . . The words 'all consequences of hostilities' refer "to the totality of causes not to their sequence or their "proximity or remoteness." Lord Sumner uses language to the same effect when he says in *The Petersham* and *The Matiana* cases (4): "It is stated, in *Ionides* v. *Universal* "*Marine Insurance Co.* (5) that 'the word "consequences" "'is a compendious description of the perils to be excepted,

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(1) [1919] 2 K. B. 670, 693.

(2) 14 C. B. (N. S.) 259.

(3) Ibid. 289.

(4) [1921] 1 A. C. 99, 131, 132.

(5) 14 C. B. (N. S.) 259, 274.

" ' and not a description relating to the loss. Instead of saying " ' what particular results are to be excepted, the word " ' " consequences " is introduced to denote the class of perils " ' which may result from hostilities ' . . . . Further, as " Willes J. says (1): ' the words " all consequences of " ' " hostilities " refer to the totality of causes, not to their " ' sequence.' They are used to save a long enumerative " description of incidents of capture seizure or detention or of " hostilities or warlike operations, as if one had said ' all " ' forms of hostilities or of warlike operations of whatever " ' kind,' and some form or kind of hostility or warlike " operations must have proximately caused the loss. Things " of which it can be predicated that they were caused by " hostilities are not themselves causes of loss additional to " hostilities, or a new description of perils insured against, " so that a remote consequence of hostilities would become a " recoverable loss, if proximately caused by something itself " describable as a consequence of hostilities." Indeed to hold that a loss was recoverable if caused by the consequences of consequences of hostilities would if logically pursued lead to the conclusion that in an ordinary Lloyds policy in the form set out in the Marine Insurance Act, 1906, losses caused by the consequences of the consequences of capture would be covered since the insured risks are stated to be " capture " etc. " and " the consequences thereof," a result which is pointed out by Lord Sumner at the end of the judgment quoted above and found unacceptable. My Lords, expressions of opinion to a similar effect might be pointed out in later judgments, and I know of no contrary opinion. I have however dealt with the question somewhat at length lest it should be thought that the insurance of the *consequences* of hostilities or of warlike operations or, for the matter of that, of capture seizure arrest restraint or detainment by the King's enemies and the *consequences* thereof in any way abrogated or lessened the effect of the rule stated in s. 55 of the Marine Insurance Act that the insurer is not liable for any loss which is not proximately caused by a peril insured against or that it widens the insurance so as to cover the consequences of consequences.

In my opinion the true effect of the language used is to insure the ship-owner against loss due to hostilities and warlike operations of all kinds and I proceed to consider the respective rights of the appellants and respondents on this basis. In

(1) 14 C. B. (N. S.) 259, 289, 290.

reaching a conclusion as to what those rights are your Lordships are of course bound by a series of previous decisions in this House beginning with *The Petersham* and *The Matiana* (1) and ending with *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (2), and it is neither advantageous nor indeed possible to try to lay down a fresh standard. I have already stated in the last-mentioned case what I believe the results of the previous decisions to have been and would only add that the opinions expressed in that case or at any rate those of the majority were to the effect that when a ship is engaged in the warlike operation of proceeding with war stores from one war base to another a collision with another ship or a grounding which is the result of that operation is a war loss. The later case of *Athel Line, Ld.* v. *Liverpool and London War Risks Insurance Association, Ld.* (*The Atheltemplar*) (3), in the Court of Appeal does not, I think, carry the principle any further. It is true that the vessel was at anchor, but she had deliberately put herself in the position in which she grounded so that it was her act that caused the loss, though she did not know what its consequences would be. The present case in some aspects seeks to extend the effect of the previous decisions. It raises two main issues—(1.) Is a loss occurring in the course of a warlike operation caused by that operation in a case where the operation itself is carried out in the same way as every operation of that kind whether warlike or not must be carried out under war conditions ; and (2.) Does the carrying of war stores on the deck of a vessel engaged on a warlike operation, at a time when normally no stores would be so carried, make the loss of or damage to the ship a war loss, if their carriage in that position was the direct cause of the loss : and would the same result follow if the loss were due to the carrying of ordinary mercantile cargo in that position. My Lords, undoubtedly the loss occurred in the course of a warlike operation, but was it caused thereby ? Admittedly not every loss so occurring is occasioned by such an operation and prima facie damage by wind and weather is a marine casualty. On the other hand the mere fact that the ultimate cause of damage was a peril of the sea is not conclusive. A ship embayed in escaping from an enemy vessel of war as in the example given in *Ionides* v. *Universal Marine Insurance Co.* (4), or a torpedoed ship which sinks in harbour some days

(1) [1921] 1 A. C. 99.
(2) [1942] A. C. 691.
(3) [1946] K. B. 117.
(4) 14 C. B. (N. S.) 259.

after she was hit but before she could be repaired as in *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (1) are cases in which the immediate cause was a sea peril, but the dominant cause was a consequence of hostilities. The question has to be treated not as a philosophical speculation, but broadly in order to ascertain what, as a practical solution, would be regarded as the cause which produced the result. Both sides take up this challenge. The loss, the appellants say, was due to the winds and waves and is therefore a peril of the seas. The vessel was subjected only to the same risks as any ship engaged on sailing the seas at that time on a commercial venture. There was nothing to connect the loss with a warlike operation, not even the carriage of cargo on deck, which any ship might undertake in order to transport goods from one country to another, when tonnage was short. On the other hand the respondents maintain that the warlike operation was the passage of the ship through the water and any damage occurring to her as a result of that passage is caused by that operation. But if, they say, having regard to the decision of the *Clan Line Steamers, Ld.* v. *Board of Trade* (*The Clan Matheson*) (2), and to the limitations suggested by Lord Wright and by myself in the *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (3), the ship which is engaged in the warlike operation must be an active participant in causing the damage which it is sought to recover; here she was an active participant. She did not merely suffer the blows of the waves, she zigzagged and failed to reduce speed or to heave to on occasions in which she would have done so, had it not been for the danger of submarine attack. As the master says, if he had been conducting this voyage in peacetime he would have hove to and wore the ship earlier and no damage would have occurred. My Lords, I do not find myself able to accept fully the arguments of either side. Whatever might have occurred in other circumstances in fact this vessel was carrying war stores on deck and that carriage exposed her to the danger which she actually encountered, i.e., the breaking adrift of those stores, with the consequent tearing of the hatch tarpaulins and carrying away of some of the hatch covers. The damage was caused not merely by the buffeting of the sea but by the deliberate increase of the risk in carrying stores on deck in a voyage from one war base to another, and was

(1) [1918] A. C. 350.
(2) [1929] A. C. 514.
(3) [1942] A. C. 691, 713.

therefore a war risk. I leave undetermined the question whether the same result would follow if the stores carried on deck were not material of war. It follows that such damage as can be said to be due to the opening of the No. 2 hatch, i.e., Mr. Willink's first head of damage was in my opinion caused by a warlike operation. The damage to the forecastle head and the after well deck is a different matter. It was not strenuously argued on behalf of the respondents that a ship merely passive when damaged by the waves would suffer a war loss though when so damaged she was engaged on a warlike operation. But here, it is said that the *Priam* was not merely passive; she was taking the active steps of zigzagging and continuing to keep her speed, so far as she was able, where under other than war conditions she would have reduced it or hove to. No doubt every active step taken by the vessel herself in proceeding to her destination is part of the warlike operation, but every step taken in the course of her voyage is not necessarily part of that progress. The damage to the forepeak and after well deck was not caused by the progress itself but by something done in the course of that progress—a method used in accomplishing the task, not the mere carrying out of the task itself and that method was common to all Allied vessels sailing the sea at that time whether engaged in a warlike operation or not. As Lord Wright pointed out in *The Coxwold* (1): "the basis of the decisions seems to be that "the casualty can be traced to definite action on the part of "those on board the warship or quasi-warship . . . . in directing the course of the vessel to carry out the warlike "operation." That direction may take her into collision with another vessel or on to a rock, but incidents may occur in the course of the voyages without being caused by such definite action on the part of those directing it. In the case of stranding or collision the progress of the ship brings her on to the rock or into the other vessel. The rock does not move; it is static. If the other vessel runs into her and it is that vessel's action which causes the injury it is the progress of that ship and not that of the damaged vessel which causes the injury, and whether that injury is a war or marine loss depends upon whether the other ship, not the damaged vessel, is engaged upon a warlike operation or upon an ordinary mercantile adventure. Where the ship is struck and injured by the sea, in substance it is not the movement of the vessel, but the motion of the sea which causes the damage. The doctrine has never been extended

(1) [1942] A. C. 691, 713.

to cover mere sea damage without more. Possibly it may cover a case where the ship is pressed into the sea for war purposes, but that is a deliberate extension of the risk in order to assist in the war effort. No such act was done in the present case, and damage caused by the force of wind or sea is not in my view war damage even though it would not have occurred if the vessel had not zigzagged or kept her speed, provided, of course, that her action in doing so did not differ from that which a ship carrying an ordinary mercantile cargo would undertake in the conditions of war.

The result of this opinion is, in my view, that the respondents succeed as to all the damage to the hatches and hatch covers of No. 2 hold and to the damage caused by the flooding of that hold including the damage due to the ship being down by the head as a result of that flooding, but do not succeed as to the damage to the forepeak or to the after well deck. The appellants have, therefore, to some extent succeeded and to some extent failed and I should leave the costs below as they are, but make no order as to costs in your Lordships' House.

My Lords, I am asked by my noble and learned friend Lord Uthwatt to say that he concurs in the opinions which have been expressed and will be expressed.

LORD NORMAND. My Lords, the question in this appeal is whether the whole or any part of the damage suffered by the *Priam* in bad weather in the Atlantic in December, 1942, was a "consequence of warlike operations," as these words are used in the war risks insurance policy to which her owners and the appellants were parties, and is therefore a loss falling on the appellants as war risk underwriters. There is an express admission that the *Priam* was at all material times engaged on warlike operations. The admission was properly given because the was carrying a cargo of military weapons and stores from Liverpool to Alexandria, both of them war bases: *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (*The Geelong*) (1). The facts relating to the cargo and its loading, the voyage, the weather encountered and the damage suffered have been fully dealt with in the speech of my noble and learned friend Lord Porter and I need not repeat what he has said. I find myself in full agreement with the conclusion which he has drawn about the part played by the deck cargo in causing the damage, and also with his observations upon the terms of the policy and in particular the meaning and effect of the words "consequences of hostilities or warlike "operations."

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(1) [1923] A. C. 191.

Both before Atkinson J. and in the Court of Appeal the respondents submitted alternative contentions: (1.) that all damage suffered by a ship by bad weather while she is on a warlike operation is a consequence of that operation, and (2.) that the operation on which the *Priam* was engaged had in the circumstances of the case to be conducted in such a way as to create additional risks and perils and that these were the "proximate cause" of the whole damage. The first of these contentions was not the ground of judgment either of Atkinson J. or of any of the learned lords justices in the Court of Appeal, and it was not the ground on which Mr. Willink for the respondents rested his case in this House. It is therefore not necessary to consider it at length. It is clear that *Clan Line Steamers, Ld.* v. *Board of Trade* (*The Clan Matheson*) (1) is inconsistent with the proposition that every casualty in which a vessel engaged on a warlike operation is involved is a consequence of the warlike operation. The casualty must be shown to have been caused by the warlike operation, or, as was said by Lord Porter in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (2), to have befallen the vessel as the result of her own action in proceeding on the voyage. I agree with my noble and learned friend Lord Porter in thinking that the damage proved to have been caused by the breaking adrift of the deck cargo is attributable to a voluntary increase of the risk by the carrying of military equipment on deck on the execution of a warlike operation, and that this damage was a consequence of the warlike operation. And, like my noble and learned friend, I leave undetermined the question whether the same result would have followed if the stores carried on deck had not been military equipment. But it was the causation of the other damage which was most anxiously debated. A question of causation is a question of fact depending on the particular circumstances connected with the event. The numerous authorities cited can therefore have only a limited bearing on the present issue. They may afford useful guidance on the way in which to approach the problem, but they will easily lead to error if it is attempted to extract from them a principle of law to solve what is a question of fact. These authorities down to the

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(1) [1929] A. C. 514.

(2) [1942] A. C. 691, 719.

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year 1942 are summarized by Lord Porter in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (1) and they are discussed by him in the pages which follow. I accept what he has there said and I shall have little occasion to make further reference to them. There are also *The Coxwold* (2) itself and the later case, *Athel Line, Ld.* v. *Liverpool and London War Risks Insurance Association, Ld.* (*The Atheltemplar*) (3), to which I shall make brief reference later. All these cases are concerned with loss by collision or stranding, and only in *The Coxwold* (2) is there some discussion obiter of loss by storm. That is an additional reason for caution in applying what has been said in these authorities to the present case. When two ships, one of them being engaged in warlike operations, collide, the collision is the cause of the damage suffered by both ships, and if the collision is occasioned by the acts or omissions (whether negligent or not) of those in charge of the vessel which is engaged on warlike operations, the loss will be borne by war risk underwriters. It does not matter whether those in charge of the other vessel also contributed to the collision by their acts or omissions. Though it may be convenient to personify the ships it is almost necessarily the conduct of those in charge of one or of both of them that brings about the collision. The *Clan Line Steamers, Ld.* v. *Board of Trade* (*The Clan Matheson*) (4) is an exceptional case, for there the collision was not caused by the acts or omissions of those in charge of the ship at the time but by a defect in her steering gear and the consequent inability of those in charge of her to control her movements. In the stranding cases, since the rock, or the shoal, or the bottom of the sea are merely passive and inert, there is in the normal case little difficulty in coming to the conclusion that those in charge of the ship by their acts or omissions, negligent or not, caused the damage. There may of course be some force operating such as an unknown set of the tide, and if it caused the collision or the stranding the result will be that the damage will be classified as caused by a marine peril and not by a war risk. The different conclusions arrived at in the Court of Appeal and in this House in *The Coxwold* (2) were, as I read the judgments, the result of a difference of opinion about the cause of the stranding. For if, as was thought in the Court of Appeal, an unknown set of the tide had baffled and thwarted the acts of the officer navigating the

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(1) [1942] A. C. 691, 715, 716.
(2) Ibid. 691.
(3) [1946] K. B. 117.
(4) [1929] A. C. 514.

Coxwold, and had borne the ship ashore in spite of the best efforts of his skill, it would have been untrue and absurd to say that his action was the proximate or the predominant or the effective cause of the stranding.

The present is a case of damage by storm, and therefore by an active force which may have an immeasurably destructive energy. Yet in some cases the predominant cause of damage by storm may not have been the storm itself, but the way in which the ship was managed or handled, and if that be the cause and if the ship was engaged on a warlike operation it may be that the loss will be borne by the war risk underwriters. The question to put in approaching this problem of causation is not whether the warlike operation was one of things which contributed to the damage, but on what would the ordinary man conversant with marine insurance business fasten as the predominant cause? (*The Coxwold* (1) per Viscount Simon L.C.) To this question the answer is, I think, that what caused the damage to the *Priam's* after well deck, poop, forepeak and windlass motor room, was bad weather complicated and aggravated by war conditions. The wind and waves would probably not have caused more than negligible damage in peace conditions, for the master would then have been able by reducing speed or heaving to or wearing ship to avert or mitigate the violence of the storm. But the risk of submarine attack prevented him from taking what he knew to be the best means of preventing damage to his ship. On the other hand the damage here under consideration was not due to the warlike nature of the voyage for any merchant ship engaged on a purely mercantile voyage and encountering the same storm would have been navigated just as the *Priam* was navigated and would (apart from the specialty of the *Priam's* deck cargo) have been exposed to just the same risks, and have suffered the same or perhaps greater damage. For the facts are clear: the master was doing his utmost to prevent damage by storm; he nearly succeeded and would probably have succeeded completely but for the war conditions which prevented him from using his skill to full advantage. It would therefore be both false and absurd to affirm, as we were invited to affirm, that the master cooperated with the storm in causing the damage, or that he was an active participant in the damage, or that by his conduct of the voyage he created new risks. Nor can it fairly be said that the master contributed by his omissions, for the only

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(1) [1942] A. C. 691, 697.

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omissions that matter were just those forced upon him by the war conditions.

If the damage was not caused by the conduct of those in charge of the *Priam* in prosecuting the warlike operation in which she was engaged, and if it cannot be attributed to the special risk undertaken in loading military equipment on her deck, there is left no ground for holding it to be a war risk loss. That result is in my opinion consistent with the previous cases. It has been expressly decided that loss attributable to war conditions is not a war risk loss (*Britain Steamship Co., Ld.* v. *The King* (*The Petersham*) and *Green* v. *British India Steam Navigation Co., Ld.* (*The Matania*) (1)), and war conditions played an important part in the causation of the damage suffered by the *Priam*. As for loss caused by wind and wave, though there is no decision, there are to be found in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (2) opinions which would exclude it from the category of war risk loss, though it is suffered by a ship while engaged in war like operations. I refer to the opinion of MacKinnon L.J. (3) in the Court of Appeal and to the opinions of Viscount Simon L.C. (4), Lord Wright (5) and Lord Porter (6), in this House. These opinions were expressed in a case in which the decision of this House attributed the damage to the action of the ship's officers in so directing her course as to drive her on to the rocks and it was immaterial to inquire whether there was negligence or fault on the part of those officers. In *Athel Line, Ld.* v. *Liverpool and London War Risks Insurance Association, Ld.* (*The Atheltemplar*) (7) the damage was by taking the ground when the ship was at anchor for the purpose of unloading, and that damage was attributable to the conduct (whether negligent or not) of those in charge of her in bringing her to anchor at the place where she suffered the damage. But the *Priam's* master was in no sense that practical people could accept, the author, however innocent, of damage to his ship. He was striving with all his skill to prevent the damage, and he would have succeeded but for the war conditions.

For these reasons I agree that the appeal should be disposed of as proposed by my noble and learned friend LORD PORTER.

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(1) [1921] 1 A. C. 99.
(2) [1942] A. C. 691.
(3) [1942] 1 K. B. 35, 45.
(4) [1942] A. C. 691, 700.
(5) Ibid. 713.
(6) Ibid. 719.
(7) [1946] K. B. 117.

THE HOUSE ordered that the order of the Court of Appeal and the judgment of Atkinson J. thereby affirmed be "varied "by directing that judgment be entered for the plaintiffs as "to all the damage to the hatches and hatch covers of No. 2 "hold, and to the damage caused by the flooding of that hold, "including the damage due to the ship being down by the "head as a result of that flooding, and that, subject to such "variation, the said order" of the Court of Appeal and the judgment of Atkinson J. be affirmed.

Appeal allowed in part.

Solicitors for appellants: *Hill, Dickinson & Co.*

Solicitors for respondents: *Bentleys, Stokes & Lowless, for Alsop, Stevens & Collins Robinson, Liverpool.*

Considered. WHITE (ORSE. BERRY) *v.* WHITE. [1948] P. 330

Applied. WHITE *v.* WHITE. [1948] 2 All E.R. 151.

Distinguished. GRIMES (ORSE. EDWARDS) *v.* GRIMES. [1948] P.323

Applied. LAURANCE *v.* LAURANCE [1950] P. 84

Applied. CACKETT *v.* CACKETT [1950] P. 258

[HOUSE OF LORDS.]

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Nov. 7, 10; Dec. 17.

BAXTER . . . . APPELLANT;

AND

BAXTER . . . . RESPONDENT.

Observation of LORD JOWITT, L.C., at p. 290, *referred to.* CACKETT (orse. TRICE) *v.* CACKETT. [1950] 1 All E.R. 677.

Divorce—Nullity—Wife's refusal to permit intercourse unless husband used contraceptives—Husband objecting but complying—Whether wilful refusal by wife to consummate marriage—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 7, *sub-s.* 1 (*a*).

A wife throughout her life with her husband, from the marriage in 1934 till he left her in 1944, invariably refused to allow him to have intercourse unless he wore a contraceptive sheath. He consistently expressed objection but nevertheless complied, believing that otherwise he would have had no intercourse.

Held that he was not entitled to a decree of nullity on the ground that she had wilfully refused to consummate the marriage, since a marriage may be consummated within the meaning of s. 7, sub-s. 1 (*a*) of the Matrimonial Causes Act, 1937, although artificial methods of contraception are used.

Cowen v. *Cowen* [1946] P. 36 and *J* v. *J* [1947] P. 158 overruled.

Decision of the Court of Appeal [1947] L. J. R. 785 affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R., Asquith L.J. and Vaisey J.).

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* *Present:* VISCOUNT JOWITT L.C., LORD WRIGHT, LORD MERRIMAN, LORD SIMONDS and LORD NORMAND.

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The facts, stated by VISCOUNT JOWITT L.C., were as follows: This was an appeal from a judgment of the Court of Appeal dismissing an appeal of the appellant husband from an order of Hodson J. dismissing his petition for a decree of nullity founded upon the allegation that the respondent wife had wilfully refused to consummate the marriage within the meaning of the Matrimonial Causes Act, 1937, s. 7, sub-s. 1 (*a*). The suit was undefended. The parties went through a ceremony of marriage on January 10, 1934, and they lived together at Hayes from that date until the husband left the wife in 1944. According to the husband's evidence the marriage was unhappy because of the determination of the wife not to have a child, a determination in which, he said, she was supported by her family. Of the latter fact he gave some striking evidence. The husband said that the wife would never allow him to have intercourse unless he took the precaution of using a sheath, that he would have been unable to have sexual intercourse at all if he had refused to do so, but that he was constantly pleading with her throughout the ten years they were together to have intercourse in the natural way. The following were questions put to the husband by Hodson J. and the answers given: "Q. Why did you not refuse to use a sheath? "A. Because then I should not have been able to cohabit with "her. Q. But you did not try? A. I have asked her ever "so many times, and for years I have pleaded with her." This evidence was to some extent corroborated by the husband of the wife's sister who proved that the wife had said to him that she would not have anything to do with the husband unless he took precautions, that she did not want any children and that her husband had to use a sheath. Both Hodson J. and the Court of Appeal accepted the evidence as to what occurred while rejecting the inference that the husband was compelled to adopt the course described. Both courts below regarded themselves as bound by the decision of the Court of Appeal in *Cowen* v. *Cowen* (1), to hold that this marriage had not been consummated. Hodson J. held further, that, by wearing a sheath and continuing to do so against his better judgment, the husband was the author of his own wrong. The Court of Appeal held that the true conclusion from all the facts was that in order to obtain the desired gratification the husband acquiesced, though no doubt reluctantly, in the conditions imposed by his wife and did so for ten years; that a reluctant acquiescence was nevertheless an acquiescence and that Hodson J. was right in his decision. The husband appealed to the House of Lords.

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(1) [1946] P. 36.

Beyfus K.C. and *Samuel Lincoln* for the appellant. The wife in law wilfully refused to consummate the marriage by her obstinate insistence on the use of a contraceptive by the husband before permitting sexual intercourse. His use of the contraceptive at her demand was not his voluntary act and therefore cannot be designated his acquiescence in its use. The fact that the wife refused to consummate the marriage gave him no right to adopt any method of force or trickery in order to have normal natural sexual intercourse. He adopted the only reasonable course open to him: to woo her and use the contraceptive in the hope that she would be won over to his outlook on marital happiness which comes with the possession of children. Till the Act of 1937 he had no possible remedy at law and his petition was in fact presented in consequence of the decision of *Cowen* v. *Cowen* (1). The husband complains of the absence of full and complete intercourse preventing him from having a child. The gratification of sensual pleasure without the consequences of procreation is a form of intercourse which he repudiates and which is not approved by any church. The Christian institution of marriage according to the Book of Common Prayer, exists (*a*) for the procreation of children; (*b*) for a remedy against sin, and (*c*) for mutual society, help and comfort. This draws a careful distinction between pleasure and procreation as ends of marriage. Marriage is not consummated by an act designed merely to satisfy carnal lust while avoiding the possible consequence of procreation. It is true that in divorce cases the courts are not concerned with the doctrines of the Church of England: *Weatherley* v. *Weatherley* (2). But it is otherwise in cases of nullity in respect of which the courts now exercise the jurisdiction of the old ecclesiastical courts: see Matrimonial Causes Act, 1857, s. 2 and Supreme Court of Judicature (Consolidation) Act, 1925, s. 21 and ss. 176 to 184. "Consummation" must mean the same thing in cases of incapacity and in cases of wilful refusal. A marriage is consummated by one act of ordinary full and complete intercourse between husband and wife, i.e., penetration followed by the emission of semen and deposit thereof within the vault of the vagina,

(1) [1946] P. 36.

(2) [1947] A. C. 628.

so that if the man is at the time fertile and the woman is at the time neither barren nor beyond the age of child-bearing, the possibility is then created of the conception of a child. These conditions are essential to consummation. The penetration is merely a preparation for consummation. At common law a man charged with rape could not be convicted without proof of actual emission, but this was dispensed with by the Offences Against the Person Act, 1828 (9 Geo. 4, c. 31), s. 18. In some cases in the animal kingdom nature dispenses with the preliminary of penetration: e.g., in the case of the salmon, the male fertilizes the eggs already laid by the female. Such an act of intercourse as the husband contends for does not cease to constitute consummation because methods operating subsequently are taken by either spouse to nullify the possible consequences of such intercourse (i.e., conception of a child), since they presuppose that such intercourse has in fact taken place. Douching is an example. A distinction must be drawn between partial intercourse on the one hand and full intercourse plus some device to prevent the conception of a child on the other. Two instances of partial intercourse are referred to in the judgment in *Cowen* v. *Cowen* (1). Such intercourse must in its very nature be incomplete. An instance of full intercourse plus a contraceptive device would be the use by the woman of a pessary in the form of a spermicidal drug. The effect of that would be similar to the use of a douche, the destruction of the spermatozoa and thus the undoing of the result of a completed act. In the case of some other methods of contraception it may be harder to determine their quality. Thus the use by a woman of a cap shutting off the uterus might be regarded as the creation of a malformation similar to that described in *D* v. *A* (2), so as to be the equivalent to the wearing of a sheath by a man. On the other hand it might be likened to the employment of a douche. So too a drug taken orally by a woman before intercourse to procure temporary sterility might be a doubtful case. In the case of the use of a sheath, however, there is clearly no full and complete intercourse; the parties are deprived of the satisfaction of actual contact and the woman does not enjoy the circulation of the seminal fluid. Nevertheless the accidental tearing of a sheath during intercourse would produce consummation, even though the factor of wilful refusal was still present, and accordingly there could be no decree of nullity. The fact that the man is

(1) [1946] P. 36, 40. (2) (1815) 1 Rob. Ecc. 279, 289.

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not fertile or that the woman is barren or beyond the age of child bearing is irrelevant in considering whether an act of ordinary and complete intercourse has taken place, for when this branch of the law was evolved these were matters impossible of ascertainment. *Cowen* v. *Cowen* (1) was properly decided. The only other case on this point is *Firth* v. *Firth* (2) decided by Langton J. on June 25, 1941. The facts were very similar to those of the present case and, though he determined the matter against the husband petitioner on a finding that he had acquiesced in the use of contraceptives, he expressed a clear opinion on the question of law: "So far as the law is con-" cerned I should have thought that there could be no doubt " at all that if the husband made out the case that the wife " refused to have intercourse save with a contraceptive, that " amounted to wilful refusal. To my intense surprise counsel " contended the opposite. He said that that did not constitute " wilful refusal. He said that it was a matter of custom and, " I am afraid, I only dimly apprehended what the custom was. " He said that we were not bound by the strict canon law " but the looser law of England. I am glad to say that I have " no acquaintance with any body of jurisprudence known as the " looser law of England. He also said that it was a matter of " common knowledge that young people, for a period, at any " rate, after their marriage had intercourse only with the inter-" vention of contraceptives. On this part of his common " knowledge I can only offer him my sympathy. It is no " part of my common knowledge and I decline to accept it as a " matter of common knowledge at all." If intercourse with the use of a sheath constituted consummation a wife who demanded its use while her husband refused might be able to petition for nullity on the ground of wilful refusal, which would be anomalous. Certainly the husband would have no remedy against her. That consummation imports emission as well as penetration appears from several works on medical jurisprudence: Oughton's Ordo Judiciorum (1738), vol. I, tit. 193, para. 17, p. 286; Paris and Fontblanque on Medical Jurisprudence (1823), vol. I, p. 204; Chitty's Practical Treatise on Medical Jurisprudence (1834), part I., p. 375; Shelford's Treatise of the Law of Marriage and Divorce (1841), pp. 201, 206; Beck's Elements of Medical Jurisprudence (1842), p. 56 and Coote's Practice of the Ecclesiastical Courts (1847), p. 370 et seq: see also Bayle's Historical and Critical

(1) [1946] P. 36.

(2) (1941) Unrep.

Dictionary (1737), 2nd ed., vol. IV., p. 800, n. 4 for the procedure known as Le Congrès in a nullity suit in France in the sixteenth century. [They also referred to *D* v. *A* (1); *Dickinson* v. *Dickinson* (2); *Napier* v. *Napier* (3) and *J* v. *J* (4).]

Karminski K.C. and *Colin Duncan* for the King's Proctor. The whole question is whether the marriage was or was not consummated: that is, whether or not *Cowen* v. *Cowen* (5) was rightly decided. Before the Act of 1937 there was no remedy at law for wilful refusal to consummate a marriage. In *Dickinson* v. *Dickinson* (2) an attempt was made to introduce one but that decision was overruled in *Napier* v. *Napier* (3). The only ground for nullity of marriage based on non-consummation recognized by the old ecclesiastical courts was such non-consummation as referred back to incapacity subsisting at the date of the marriage. The decree was granted on the basis that the marriage was and always had been null and void. Accordingly, little help is to be derived from the decisions of the ecclesiastical courts since there is a distinction between matters precedent to the marriage and matters arising subsequently: see *Napier* v. *Napier* (3). In cases of wilful refusal the courts are bound not by the canon law but by the statute law of England: see *Weatherley* v. *Weatherley* (6). There is an essential distinction between the question whether or not a marriage has been consummated as a physical act and the question whether or not that act may result in procreation. On this point *L* v. *L* (7) was rightly decided and *J* v. *J* (4) which is wholly inconsistent with it was not. *Cowen* v. *Cowen* (5), which was not fully argued on both sides, was wrongly decided. In *D* v. *A* (1) the point was whether a limited form of coition was sufficient to constitute intercourse, and that is a different question. Coitus interruptus or withdrawal before emission would be incompatible with full intercourse. The essentials of consummation are erectio, intromissio and ejactulatio, viz., emission in the body of the woman. Once these are present there is full intercourse and it does not matter what afterwards happens to the semen. The test of consummation is whether the parties get full physical satisfaction from it, e.g., whether an orgasm is produced in the woman. The procedure known as Le Congrès described in Bayle's Dictionary throws no light on the matter. It was admittedly uncertain in operation and it was abolished in France on February 18, 1677. See Poynter's Doctrine and Practice of the Ecclesiastical Courts, 2nd ed. (1824), p. 135. As to the question of acquiescence by the husband in the present case, the evidence shows that he approbated the marriage: see *G* v. *M* (1). A stage was bound to come when he was obliged to make his election between accepting what had gone on between himself and his wife and invoking the Act of 1937. The length of time open to him for that purpose depends on the circumstances of the particular case but here the position had endured for ten years. He complains now of "wilful "refusal" but wilful refusal must be against the will of the person refused and implies some element of conscious volition by the other party. Light is thrown on the construction of the phrase by *In re Dick* (2), *In re Mills' Trusts* (3) and the cases cited in Rayden on Divorce (4th ed.), p. 115 on "wilful "neglect to maintain" in the Summary Jurisdiction (Married Women) Act, 1895.

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(1) 1 Rob. Ecc. 279, 298-9.
(2) [1913] P. 198.
(3) [1915] P. 184.
(4) [1947] P. 158.
(5) [1946] P. 36.
(6) [1947] A. C. 628, 633.
(7) (1922) 38 T. L. R. 697.

Beyfus K.C. in reply. The husband did not acquiesce in the position. Before the Act of 1937 he would have had no remedy and *Cowen* v. *Cowen* (4) on which he bases his suit was not determined till many years later. As to consummation, the King's Proctor admits that coitus interruptus does not amount to full intercourse and that emission in the vagina is necessary. On this point the important phrase in the account of Le Congrès is "an facta sit emissio, ubi, quid et quale "emissum." The question whether the parties obtained full physical satisfaction is one of medical jurisprudence and if *Cowen* v. *Cowen* (4) is not followed the petitioner should be given the chance of calling medical evidence on this point, as in the court of first instance he had to treat the matter as decided by that case. It should be affirmed now or, if it is not, a new trial should be ordered at which the principles laid down by the House can be applied.

The House took time for consideration.

Dec. 17. Viscount Jowitt L.C. My Lords, the difficulties of this case have not been diminished by the fact that it was an undefended suit; but, like the Court of Appeal, this House has had the advantage of hearing counsel for the King's Proctor. This ensured that any argument that could have been urged on behalf of the wife was before your Lordships. Section 7 (I.) (*a*) of the Matrimonial Causes Act, 1937, reads as follows: "In addition to any other grounds on which a "marriage is by law void or voidable, a marriage shall be "voidable on the ground (*a*) that the marriage has not been "consummated owing to the wiful refusal of the respondent "to consummate the marriage; . . . ." From this it follows that there are two distinct issues, first, whether the marriage has been consummated at all, and secondly, if not, whether that is owing to the wilful refusal of the respondent spouse. Both courts below regarded themselves, as indeed they were, as bound by the decision of the Court of Appeal in *Cowen* v. *Cowen* (1), to hold that this marriage had not been consummated and the second of the issues mentioned above alone remained for consideration. Hodson J. held that by wearing a sheath and continuing to do so against his better judgment the husband was the author of his own wrong. The Court of Appeal held that the true conclusion from all the facts was that in order to obtain the desired gratification the husband acquiesced, though no doubt reluctantly, in the conditions imposed by his wife and did so for ten years; that a reluctant acquiescence was nevertheless an acquiescence and that Hodson J. was right in his decision. They added (2): "A "petitioner who only succeeds in proving a refusal in which "he has acquiesced does not, in our opinion, establish that "non-consummation is due to a wilful refusal by the respon- "dent within the meaning of the statute." If your Lordships were able to accept this view it might be unnecessary to go further and to inquire whether *Cowen* v. *Cowen* (1) was rightly decided. But in my opinion, in which I understand that your Lordships unanimously concur, the evidence does not justify the conclusion to which the learned judge and the Court of Appeal have come. I find it impossible to conclude from the evidence that the husband acquiesced in the wife's refusal to have normal intercourse so as to debar himself from the relief (if any) which such refusal would give him. Adopting an expression sometimes used in this branch of the law, I might say that the husband has shown no such lack of sincerity as to

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(1) (1885) 10 App. Cas. 171, 184 et seq.

(2) [1926] Ch. 996.

(3) (1888) 40 Ch. D. 14, 19.

(4) [1946] P. 36.

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(1) [1946] P. 36.

(2) [1947] L. J. R. 785, 788.

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disentitle him from obtaining any remedy to which he is otherwise lawfully entitled. Nor (to use the words of Lord Selborne L.C. in *G* v. *M* (1)) can it be said of him that he acquiesced in a course of conduct with "knowledge of everything which it is material to know." In this connexion it must be remembered that, while the marriage took place on January 10, 1934, the Matrimonial Causes Act, 1937, did not come into force until January 1, 1938, so that for almost four years the law, in any view of it, provided him with no remedy for that of which he now complains. Moreover the judgment of the Court of Appeal in *Cowen* v. *Cowen* (2) was not given until July 16, 1945, and it may fairly be inferred that he did not foresee that the court would decide that in such a case as his the marriage had not been consummated. By that time he had already parted from his wife. In these circumstances I find myself unable to agree with the courts below in holding that anything in the husband's conduct prevented the wife's refusal to have normal intercourse from being the cause of the assumed non-consummation. Nor, on the assumption that the husband has established a ground for relief, can I hold that anything in his conduct has disentitled him, in the circumstances, from obtaining relief.

On this view of the matter your Lordships are obliged to consider whether *Cowen* v. *Cowen* (2) was rightly decided. If that decision was right it would be impossible to distinguish this case from it. The facts in *Cowen* v. *Cowen* (3) are sufficiently summarized in the judgment of the Court of Appeal as follows: "The parties were married in 1932. They were "both young. At first they lived in Persia, and the danger of "childbearing for a European woman in Persia was then so "grave that they agreed to take steps to prevent conception "while they were in that country. The husband habitually "used a rubber sheath when intercourse took place. In "May, 1937, the spouses came to England on leave and the wife "pressed her husband to abandon this precaution against "conception, in order that she might have a child. He refused. "From the end of 1937 until the spring of 1939 they were "in Persia, and although conditions had improved there and "she was willing to have a child, her husband persisted in his "habitual practice. In the spring of 1939 the wife came to "England, and wrote a letter to her husband in which she

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(1) 10 App. Cas. 171, 186.
(2) [1946] P. 36.
(3) Ibid. 38.

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" begged him, to use her own words, to live ' a normal married ' life ' with her. He ignored this request. She returned to Persia, and the only change in their relations which took place was that, after the outbreak of war, and owing to the difficulty of obtaining such articles as the husband had previously used, he had recourse to the practice of withdrawal before emission, or coitus interruptus. This occurred on but a few occasions. Relations between the spouses became strained. The husband's reiterated refusal to give his wife an opportunity of becoming a mother led to disputes. Finally, in 1944, she left him and began the present proceedings."

Before examining that case I wish to make an observation on one practice referred to in this summary of facts, namely, that of withdrawal before emission, or coitus interruptus. This practice, as distinct from artificial methods of contraception, does not arise in the case before the House and I prefer to express no opinion about it. I desire also to reserve the question as to what bearing the employment of force or fraud may have on the issue of consummation.

Leaving aside the question of withdrawal, it will be seen that the spouses from the date of the marriage in 1932 to 1939 invariably used a rubber sheath. This was not only so during the early years of the marriage, when the practice was adopted by mutual consent because of the dangers to a European woman of childbirth in Persia, but during a joint visit to England in 1937 and on return to Persia when the conditions in that country had improved. During these two latter periods the wife, like the husband in the case before the House, was continually pressing the husband to abandon this precaution in order that she might have a child. In other words, from 1937 onwards the wife was ready and willing, but the husband was not, to have sexual intercourse in the natural way. The main ground of the decision was as follows: after saying that the Matrimonial Causes Act, 1937, contains no definition of the word " consummate " and that Parliament no doubt intended it to be understood in the sense in which it had hitherto been employed by judges dealing with matrimonial causes in this country and pointing out that before the Act the question whether a marriage had been consummated usually arose in connexion with the particular question whether one of the parties was lacking in capacity to consummate, the judgment proceeds (1): " Thus, it is no doubt true to say that normally

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(1) [1946] P. 36, 39.

"the question was whether penetration by the male organ "could be, and had been, effected. Before 1937, the question "whether the emission of semen into the body of the female "was necessary in order to constitute such complete pene"tration as would amount to a consummation of the marriage "could only arise if, through some malformation of the "husband's organs of generation, such emission was rendered "impossible. In such a case we have no doubt that an "ecclesiastical court would have held that a husband suffering "from such malformation was impotent, and that the marriage "to which he was a party was voidable at the wife's instance. "This, we think, necessarily follows from the generally "recognized truth that one of the chief ends of marriage is the "procreation of children." After reference to certain textwriters, the judgment proceeds (1): "It is true that sterility "in man or woman has never been a ground for avoiding a "marriage. Apart from the fact that in many cases it would "even now be impossible to prove that a spouse is incurably "sterile and that in earlier days such proof would almost "always have been impossible, there are obvious reasons "of a religious and social character why sterility should "not of itself be a sufficient reason for a decree of nullity. "But in order that intercourse should be complete, it is well "established that there must be what Dr. Lushington referred "to as 'vera copula.' 'Sexual intercourse,' he said, 'in "'the proper meaning of the term, is ordinary and complete "'intercourse; it does not mean partial and imperfect "'intercourse' see (*D* v. *A* (2)). We are of opinion that sexual "intercourse cannot be said to be complete when a husband "deliberately discontinues the act of intercourse before it has "reached its natural termination, or when he artificially "prevents that natural termination, which is the passage of the "male seed into the body of the woman. To hold otherwise "would be to affirm that a marriage is consummated by an "act so performed that one of the principal ends, if not the "principal end, of marriage is intentionally frustrated."

It is necessary first of all to consider what is involved in saying that Parliament must have intended the word "con"summate" to be understood in the sense in which it had hitherto been employed by judges dealing with matrimonial causes in this country. By s. 22 of the Matrimonial Causes Act, 1857, which set up the "Court for Divorce and Matri-

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(1) [1946] P. 36, 40.

(2) 1 Rob. Ecc. 279, 298.

"monial Causes," it is enacted that: "In all suits and "proceedings, other than proceedings to dissolve any marriage, "the said court shall proceed and act and give relief on "principles and rules which in the opinion of the said court "shall be as nearly as may be conformable to the principles "and rules on which the ecclesiastical courts have heretofore "acted and given relief, but subject to the provisions herein "contained and to the rules and orders under this Act." Manifestly this section applies, amongst other things, to suits for nullity on the ground of incapacity; while proceedings to dissolve any marriage were expressly excepted because the old ecclesiastical courts had no jurisdiction in this respect. The same jurisdiction is inherited by the High Court and the Court of Appeal respectively by virtue of the provisions of s. 32 of the Supreme Court of Judicature (Consolidation) Act, 1925. The practical importance of this provision is illustrated, for example, by the fact that mandatory orders for medical inspection are still made in suits for nullity on the ground of incapacity since it was the practice of the ecclesiastical courts to make such orders (and in earlier days to enforce them by commitment) while in the case of suits for nullity on the ground of wilful refusal to consummate medical inspection is permissive only. It is necessary, however, to beware of applying too literally to suits for nullity under the section in question in this case principles and rules relating to suits for nullity on the ground of incapacity under the old jurisdiction. In such a suit it was, and still is, necessary to prove that at the time of the marriage the particular wife or husband was incapable of consummating the marriage with the other spouse, whereas the section has introduced as a ground of nullity a cause necessarily arising after the marriage which, as Pickford L.J. said in *Napier* v. *Napier* (1) was "contrary to the principles "of the ecclesiastical law as administered in the ecclesiastical "courts." The particular question with which this House is concerned could only have arisen in the case of a husband who was proved only to be capable of having sexual intercourse at all if some such method of contraception as that in question here were adopted. Such a condition of things may be possible in a medical sense, but I think that it is so unlikely in real life that it is not surprising that counsel were unable to cite any case in which incapacity took such a form. It is clear, therefore, that in relation to the meaning of the word "consummate",

(1) [1915] P. 184, 189.

the common area covered by suits for nullity on the grounds respectively of incapacity, and of wilful refusal, to consummate is very small.

Again, the insistence on the procreation of children as one of the principal ends, if not the principal end, of marriage requires examination. It is indisputable that the institution of marriage generally is not necessary for the procreation of children; nor does it appear to be a principal end of marriage as understood in Christendom, which, as Lord Penzance said in *Hyde* v. *Hyde* (1), "may for this purpose be defined as the "voluntary union for life of one man and one woman, to the "exclusion of all others." As regards the phraseology of the marriage service in the Prayer Book, this House in the recent case of *Weatherley* v. *Weatherley* (2) pointed out the dangers of too strict a reliance upon these words. In any view of Christian marriage the essence of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith. But this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage. Counsel were unable to cite any authority where the procreation of children was held to be the test in a nullity suit. On the contrary it was admitted that the sterility of the husband or the barrenness of the wife was irrelevant. This was laid down as an accepted principle in the case of *D* v. *A* (3), in which case Dr. Lushington said: "Mere incapability, however, of conception is not a "sufficient ground whereon to found a decree of nullity, and "alone so clearly insufficient, that it would be a waste of time "to discuss an admitted point. The only question is, whether "the lady is or is not capable of sexual intercourse, or, if at "present incapable, whether that incapacity can be removed."

As this case formed the basis of the decision of the Court of Appeal in *Cowen* v. *Cowen* (4) it will be necessary to examine it closely. When Dr. Lushington said that he apprehended all were agreed that, in order to constitute the marriage bond between young persons, there must be the power, present or to come, of sexual intercourse, but that the difficulty lay in the meaning of the term sexual intercourse, and said that sexual intercourse, in the proper meaning of the term, was ordinary and complete intercourse, that it did not mean partial and imperfect intercourse yet he could not go to the length of saying that every degree of imperfection would deprive it of its essential character, he was speaking of a case in which the wife had no uterus at all and therefore no power of conception ; hence the reference to mere incapability of conception not being a sufficient ground. But the vagina itself was so malformed as to be a mere cul-de-sac measuring, at the extreme, two inches in depth as against the natural depth of four to four and a half inches (1). Evidence also showed (2) that it was just possible that a further improvement, though only to a very slight degree, might take place by continual frequent sexual intercourse or by mechanical means, but that no improvement would or could arise to any but a very trifling extent. It was in relation to this state of things thus ascertained or to be ascertained (for in his judgment Dr. Lushington said that there was some ambiguity in the evidence and ordered the further inquiry resulting in the precise information quoted above) that Dr. Lushington said (3) : " In one sense of the term, there " can be no doubt, namely, that as relates to conception, the " malformation is incurable ; but it is to me doubtful, whether " they mean that it is incurable as to the mere coitus. In this " difference, I think, lies the true distinction. If there be a " reasonable probability that the lady can be made capable of a " vera copula—of the natural sort of coitus, though without " power of conception—I cannot pronounce this marriage void. " If, on the contrary, she is not and cannot be made capable " of more than an incipient, imperfect and unnatural coitus, " I would pronounce the marriage void." That means that had Dr. Lushington been satisfied that the vagina could by natural or artificial means have been extended by two inches or thereabouts he would have been obliged to refuse a decree on the ground that the wife was capable of vera copula, the complete absence of the uterus notwithstanding. The submission based on *D* v. *A* (4) is neatly summarized in the last sentence in the report of counsel's argument in *Cowen* v. *Cowen* (5) in these words : " Man has created a malformation " by the device and practice of using a sheath." But nothing is left of the argument when it is understood that the key to Dr. Lushington's judgment is that he thought the true distinction lay in the answer to the question whether the malformation was incurable not as related to conception but "as to the mere coitus." He held that a natural malformation having precisely the same result in relation to conception as a sheath, would not be a ground of nullity, provided the vagina could be penetrated to the usual depth before encountering the malformation.

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(1) (1866) L. R. 1 P. & D. 130, 133.

(2) [1947] A. C. 628, 633.

(3) 1 Rob. Ecc. 279, 296.

(4) [1946] P. 36.

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(1) 1 Rob. Ecc. 279, 301.
(2) Ibid. 303.
(3) Ibid. 299.
(4) Ibid. 279.
(5) [1946] P. 36, 37.

The case of *D* v. *A* (1) was considered by Horridge J. in the case of *L* v. *L* (2). This was a case in which before marriage the respondent underwent an operation entailing the removal of the right ovary and of the right fallopian tube and the almost entire removal of the left ovary and of the left fallopian tube which rendered her quite incapable of impregnation, but complete penetration was not impossible. After referring to Shelford's Treatise of the Law of Marriage and Divorce, to which we have been referred and upon which the Court of Appeal relied in *Cowen* v. *Cowen* (3), Horridge J. continued (4): "Does 'a capacity of consummation' mean penetration merely "or penetration followed by fertility? The authorities cited "in the footnote certainly speak of the procreation of children "as being essential to marriage, but the question is whether "they refer merely to the capacity to procreate, or to the "capacity to do an act which usually results in procreation. "The question would be of greater difficulty if it were not for "the decision of Dr. Lushington in *D* v. *A* (1). In that case "the respondent had no uterus, and the vagina was very short. "If Mr. Bayford's argument were correct, counsel for the "petitioner in that case would merely have had to prove that "the respondent had no uterus; but the question whether the "possibility of partial penetration was a ground for refusing "relief was there exhaustively considered, and the decision "turned on the impossibility of complete penetration. All that "inquiry would have been unnecessary if Mr. Bayford's "argument were sound, and in that sense the question was "directly involved in the case, and I cannot regard Dr. Lushington's opinion on this point as obiter." The learned judge then said that the passages to which I have already referred disposed of the husband's case. I am in complete agreement with this judgment. The case of *L* v. *L* (2) was not cited to

(1) 1 Rob. Ecc. 279.
(2) 38 T. L. R. 697.
(3) [1946] P. 36.
(4) 38 T. L. R. 697, 698.

the Court of Appeal in *Cowen* v. *Cowen* (1). Nor was it cited to the Court of Appeal in the case of *J* v. *J* (2). The facts in that case are indistinguishable from those in *L* v. *L* (3). Both were cases of sterility artificially produced before marriage but the operation had left the husband in *J* v. *J* (2) able to achieve penetration and emission. I do not think that the decision in that case can be supported.

It seems to me that the true view of the matter is expressed in Lord Stair's Institutions, 1681 ed., book I., tit. 4, para. 6. That learned and distinguished author put the matter thus: "So then, it is not the consent of marriage as it relateth to the "procreation of children that is requisite; for it may consist, "though the woman be far beyond that date; but it is the "consent, whereby ariseth that conjugal society, which may "have the conjunction of bodies as well as of minds, as the "general end of the institution of marriage, is the solace and "satisfaction of man." I am content to adopt these words as my own.

The argument of this appeal exposed the morass of difficulties in which the courts must necessarily become involved in applying the principles laid down in *Cowen* v. *Cowen* (1). It is well known that the use of a sheath is by no means the only method of contraception in common use. I desire to avoid unnecessary detail on this topic. Suffice it to say that the use of the corresponding device of a mechanical pessary was at one point of the argument said to be indistinguishable from the use of a sheath, but at another point was likened to the employment of a douche, which, it was said, would not negative consummation because both were intended to operate after the sexual act was completed; so, it was suggested, was the pessary in the form of a spermicidal drug inserted before, but operating after, the sexual act. The procurement of sterility, whether temporary or permanent, by a drug taken orally was left in doubt. It was, however, admitted that a rupture of a sheath in the course of the sexual act on a single occasion would involve that the marriage had been consummated, though unwittingly and unintentionally. That these illustrations are not fanciful is shown by the fact that during the current sittings, in a suit resembling the present, the decision turned on the fact that the judge accepted the husband's admission that on an isolated occasion there had been a hole in the sheath

(1) [1946] P. 36.
(2) [1947] P. 158.
(3) 38 T. L. R. 697.

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and the wife's evidence that she herself had not prevented the possibility of conception on that occasion, as the husband alleged, either by wearing a mechanical pessary or inserting some contraceptive jelly. I am unable to believe that Parliament by using the word "consummate" in connexion with this new ground of nullity intended that the courts should be involved in inquiries of this sort. Long before the passing of the Matrimonial Causes Act, 1937, it was a matter of common knowledge that reputable clinics had come into existence for the purpose of advising spouses on what is popularly called birth control, and (with all respect to a dictum to the opposite effect by the late Langton J. in the unreported case of *Firth* v. *Firth* (1)) it is also a matter of common knowledge that many young married couples agree to take contraceptive precautions in the early days of married life. I take the view that in this legislation Parliament used the word "consummate" as that word is understood in common parlance and in light of social conditions known to exist, and that the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief. On this basis I am constrained to say that in my opinion there is no warrant for the decision in *Cowen* v. *Cowen* (2). The result is that I would dismiss this appeal.

I have to say that my noble and learned friends, Lord Merriman and Lord Normand, concur in this opinion.

LORD WRIGHT. My Lords, I have had the opportunity of considering in print the speech which has just been delivered by my noble and learned friend the Lord Chancellor. I completely concur in it and have nothing to add.

LORD SIMONDS. My Lords, I also concur.

Appeal dismissed.

Solicitors: *William P. Webb*; *The King's Proctor.*

(1) (1941) Unrep.

(2) [1946] P. 36.

Observations of VISCOUNT SIMON, at pp. 315, 317, *applied.* ROPPEL *v.* BENNETT. [1948] 2 All E.R. 627.

Applied. ROPPEL *v.* BENNETT. [1949] 1 K. B. 115

Applied. ARTILL. MANS. *v.* MACARTNEY. [1949] 1 K. B. 164

Dicta of VISCOUNT SIMON, at p. 314, *applied.* ARTILLERY MANSIONS, LTD. *v.* MACARTNEY. [1948] 2 All E.R. 875.

Applied. LAZARUS-BARLOW *v.* REGENT ESTATES CO. LD. [1949] 2 K. B. 465

[HOUSE OF LORDS.]

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June 9, 10, 13, 16, 17, 19, 20, 27, 30; *Dec.* 19.

PALSER . . . . APPELLANT;

AND

GRINLING . . . . . . RESPONDENT.

PROPERTY HOLDING CO. LIMITED . APPELLANTS;

AND

MISCHEFF . . . . . . RESPONDENT.

Landlord and tenant—Rent restriction—Letting of dwelling-house—Rent including payments in respect of attendance or for use of furniture—Whether "substantial portion" of rent—Method of ascertainment—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1 (*as amended*)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*); *sch. I.*

By s. 3, sub-s. 2 of the Rent and Mortgage Interest Restrictions Act, 1939: "The principal Acts shall not, by virtue of this section, "apply . . . . (*b*) save as is expressly provided in the said Acts, "as amended by this section, to any dwelling-house bona fide let "at a rent which includes payments in respect of board, attendance "or use of furniture . . . ."

By s. 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923, as amended by sch. I. to the Act of 1939: "For the "purposes of para. (*b*) of sub-s. 2 of s. 3 of the Rent and Mortgage "Interest Restrictions Act, 1939 . . . . a dwelling-house shall "not be deemed to be bona fide let at a rent which includes "payments in respect of attendance or the use of furniture unless "the amount of rent which is fairly attributable to the attendance "or the use of furniture, regard being had to the value of the same "to the tenant, forms a substantial portion of the whole rent."

The words "bona fide let at a rent which includes payments "in respect of board, attendance or use of furniture" amount to a stipulation that the rent paid genuinely includes payments in respect of board, attendance or use of furniture and, as regards use of furniture, a further test is imposed by s. 10, sub-s. 1 of the Act of 1923.

"Attendance" means services personal to the tenant performed, in accordance with the landlord's covenant, for the benefit or convenience of the individual tenant in his use or enjoyment of the demised premises, by an attendant provided by the landlord, not services common to others, such as the heating of a communal water system.

"Furniture" has a statutory meaning which cannot be extended merely because the landlord stipulates in the lease that certain things are to be so regarded, when in fact they do not fall within the proper interpretation of the word. Only those articles commonly and currently regarded as furniture can rank as such; but articles belonging to the landlord and otherwise entitled to be classed as furniture for the purposes of s. 10, sub-s. 1 of the Act of 1923 must be excluded if they are so affixed to the fabric as to be incapable of detachment without appreciable damage to or alteration of the fabric or themselves and accordingly form part thereof, thus constituting part of the dwelling-house itself. Articles provided for use and enjoyment in places outside the demise, such as halls and passages used in common with other tenants, are not "furniture" for the purposes of s. 10, sub-s. 1.

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* *Present:* VISCOUNT SIMON, LORD THANKERTON, LORD PORTER, LORD UTHWATT and LORD MACDERMOTT.

Gray v. *Fidler* [1943] K. B. 694, considered.

In the phrase "the amount of rent which is fairly attributable "to attendance or the use of furniture, regard being had to the value "of the same to the tenant" the expression "the amount of rent" is equivalent to "the portion of the whole rent"; the expression "the tenant" means the actual tenant whose lease is under examination; the direction that "regard shall be had" to the value to the tenant means not that the value shall govern the calculation absolutely but that it must be suitably allowed for in the exercise of a broad judgment, when other factors are duly considered, and the amount "fairly attributable" to the item is not necessarily that which is actually attributed to it in the lease. The questions involved are to be answered by common-sense considerations rather than by any formula which can be laid down.

The expression "substantial portion," which requires comparison with "the whole rent," does not mean "not unsubstantial" but is equivalent to considerable; the judge of fact must decide the matter according to the circumstances in each case, the onus being on the landlord.

"The whole rent" means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. Whether the landlord pays the rates or not is immaterial in arriving at "the whole "rent."

Decisions of the Court of Appeal [1946] K. B. 631, 645 affirmed.

APPEALS from the Court of Appeal (Morton, Somervell and Asquith L.JJ.).

The facts, stated by VISCOUNT SIMON, were as follows:

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In this appeal, the appellant, Mrs. Palser, was the owner of a block of twenty-four flats known as Chantrey House, Eccleston Street, in the county of London, and by a lease dated February 16, 1944, she demised to the respondent,

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Mrs. Grinling, for a term of one year from March 25, 1944, at a yearly rent of 175*l.*, payable quarterly, a flat numbered 13, situated on the fourth floor of the said block of flats. Flat No. 13 contained a sitting room, bedroom, kitchen and bathroom. The lease contained (inter alia) the following provisions:

(1.) By cl. 1 the appellant demised to the respondent the said flat " together with the use in common with the landlord and " persons authorized by her of the entrance hall staircases " landings and passages leading to the demised premises and " the passenger lift in the said building subject to the " regulations in regard to such user set forth in the schedule." (2.) By cl. 2 (Q) the respondent covenanted (inter alia) to " observe and strictly conform to such general regulations " governing all flats in the said building as may from time to " time be adopted by the landlord hereof." (3.) By cl. 3 (A) the appellant covenanted (inter alia) to " keep the entrance " hall staircases and passages of the said building clean and " the lift leading to the demised premises in working order " and, subject to certain conditions, to " provide and maintain a " supply of hot water for reasonable domestic purposes " with a proviso that the appellant should " have complete " discretion with regard to the appointment discharge or " removal of any staff including that of a hall porter employed " for the performance of the said services." (4.) By cl. 3 (B) the appellant covenanted to " pay all general and water rates " payable in respect of the demised premises." If the rates were increased during the tenancy, the respondent, by cl. 2 (J) covenanted to pay " such sum by way of additional rent as " shall be equivalent to the amount of such increase." (5.) The general regulations referred to were appended to the said lease and included the following: " 1. The main entrance " door of the building shall be in charge of the resident porter " or other person deputed by the landlord . . . . 5. . . . . " Any goods or parcels to be delivered to the tenants shall in " the first instance be delivered to the resident or other house- " keeper on the premises to whom the tenants shall detail all " orders for communication to the tradespeople . . . . . " 6. All coal required by the tenants shall be sent up to the " flats before 10 a.m. by the resident porter or such other " person as the landlord may instruct. Any refuse from " each flat shall be placed in a suitable receptacle to be provided " by the tenant which will be emptied and returned by the " said porter or such other person as the landlord may instruct "and no such receptacle shall be allowed to remain outside "any flat." The total remuneration received by the porter from the appellant (including the rental value of the flat with which he was provided) was about 340*l.* a year. His main duties were downstairs where he had many things to do as the appellant's servant.

The appellant commenced proceedings by a specially indorsed writ issued on April 30, 1945, and by her statement of claim thereon claimed possession of the said flat on the ground that the term of one year for which the appellant had demised it to the respondent had expired on March 25, 1945. By her defence and counterclaim the respondent pleaded that the said flat was a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920–1939 applied. The respondent also counterclaimed 88*l.* 14*s.* 6*d.* as being rent paid above the standard rent. By her reply the appellant pleaded that at all times material the said flat was bona fide let at a rent which included payment in respect of attendance and that the payment fairly attributable to the attendance, regard being had to the value of the same to the respondent, formed a substantial portion of the whole rent. This first case, therefore, depended on the appellant's contention that the rent included such payment in respect of "attendance" as took the flat outside the Rent Restriction Acts. No question of "furniture" was involved. If this contention failed it was not in dispute that the respondent would also succeed on her counterclaim. Both Lord Goddard C.J. who tried the case, and the Court of Appeal (Morton, Somervell and Asquith L.JJ.) decided that the appellant's contention failed. The appellant appealed to the House of Lords.

PROPERTY HOLDING CO. LD. *v.* MISCHEFF.

In this appeal, the appellants, Property Holding Co. Ld., were the owners of a block of flats known as Albion Gate, Hyde Park, in the county of London. By a lease dated January 27, 1937, the appellants demised to one Eric Trevor, at a yearly rental of 275*l.*, with the addition of 1*l.* 6*s.* 3*d.* per quarter in respect of the basic charge for electricity for the said block of flats, from March 1 to 25, 1937, and thence for a term of fourteen years, a flat numbered 19 (hereinafter called "the "said flat") situate in the said block of flats. It was alleged by the appellants that the rent included payments in respect of attendance and use of furniture forming a substantial portion of the whole. Flat No. 19 was on the ground floor, and contained two sitting rooms, three bedrooms, a kitchen and two bathrooms. By a licence dated May 5, 1942, the appellants granted to the said Trevor licence to underlet the said flat to the respondent for a term of two and a half years from March 25, 1942, with the option on the part of the sub-lessee to determine the tenancy at the end of the first year. By an agreement under seal dated June 26, 1942, the said flat was sub-let to the respondent by Trevor for a term of one year from March 25, 1942, with an option to the respondent (which was exercised) to continue for a further period of one year and six months from the expiry thereof at a yearly rental of 275*l.* with the addition of the said quarterly basic electricity charge. The period for which the sub-lease was granted did not in form correspond with the period authorized by the licence, but it was not suggested that the granting of the sub-lease was not duly authorized by the licence. Pursuant to a provision of his said lease from the appellants, Trevor gave a notice determining his said term on March 25, 1944. By a deed subsequent to the notice, dated October 18, 1943, Trevor's tenancy was extended to September 29, 1944, at a yearly rental of 375*l.* with the addition of a payment of 6*l.* 4*s.* 4*d.* per annum in respect of the basic electricity charge of the said block of flats.

The sub-demise by Trevor to the respondent included exactly the same property as was included in the head-lease, the articles referred to in the sub-lease as "landlord's fixtures" being the same as those to which that term was applied in the head-lease. Subject to some verbal adaptations, to the alteration in the period, and to one immaterial exception, the sub-lease reproduced verbatim the language of the head-lease. The following terms of the sub-lease were material: (1.) By cl. 1 Trevor leased to the respondent the said flat "together with "the use of the landlord's fixtures therein and together also "with the right of ingress and egress to and from the said flat "by the lessee and all persons authorized by him in common "with all other persons entitled to the like right at all times "along and through the passages stairs doors of the said "building and together with the use by the same persons in "common aforesaid of the lifts of the said building and together "also with all privileges and appurtenances to the said flat "belonging or appertaining . . . ." (2.) By cl. 3 of the lessee's covenants the respondent agreed that he would "at "the end or sooner determination of the said term peaceably "yield up the said flat and the landlord's fixtures including "those set forth in the first schedule hereto and the appurtenances thereto to the lessor." (3.) By cl. 2 of the lessor's covenants, the lessor covenanted to "pay or cause to be paid all "outgoings taxes and assessments charged upon or in respect "of the premises hereby demised (excepting any charge for "gas and electricity current used in the said flat which the "lessee shall pay to the proper authorities)." (4.) By cl. 3, the lessor covenanted to "cause to be lighted the staircase "and landing of the said building and will at all times cause "the same to be kept properly cleaned and swept but shall "not be liable to remove any litter or dirt caused by the lessee "and the lessor also undertakes that there shall be provided a "resident porter and that he will use his best endeavours to "procure the maintenance at all reasonable hours of an "available supply of hot water for domestic purposes and also "during the period from September 30 to May 1 in every year "for the central heating apparatus." (5.) By the second schedule, cl. 3, it was provided that "the lessor shall not be "held responsible for any act committed by the porter or any "persons acting under him and the porter shall be under no "obligation to furnish attendance or other use of his services "to occupiers for their private convenience." (6.) By the second schedule, cl. 8, it was provided that "all services "(other than as aforesaid) rendered to the lessee by the "porter shall be considered as rendered by him as the servant "of the lessee and the lessor will not be responsible for the "same or any consequence thereof."

The appellants commenced proceedings by a specially indorsed writ issued on October 9, 1944, and by their statement of claim thereon claimed possession of the said flat on the ground that their lease to Trevor had expired on September 29, 1944, and mesne profits at the rate of 375*l.* per annum from September 29, 1944. By his defence delivered on November 7, 1944, the respondent pleaded (inter alia) that the flat was controlled in accordance with the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and that the respondent continued in possession of the said flat as a statutory tenant. The action was tried before Henn Collins J. when the appellants proved certain facts and advanced certain contentions now set out in their printed case, as follows: "(1.) That "the said flat while let to the respondent contained the "following articles which were provided by the appellants, such "articles being in 1942 of the respective values hereinafter "set out: A kitchen cabinet, 45*l.* A refrigerator, 80*l.* "Linoleum in the kitchen, the bedrooms, the lobby and the "maid's bathroom, 42*l.* Rubber floor covering in the principal "bathroom and a mirror in the cloakroom, 8*l.* A fitted "medicine chest in the principal bathroom, 20*l.* (2.) That the "halls, landings and staircases in the said block of flats over "which the respondent had, together with persons authorized "by him, the right to ingress and egress . . . . were furnished "with the following articles provided by the appellants, which "were of the respective values in 1942 as hereinafter set out: "Carpets, 1,320*l.* Thick underfelt, 120*l.* Window hangings "and pelmets, 288*l.* A settee in the entrance hall, 30*l.* "(3.) That the occupants of 24 flats had the use of the articles "last referred to. It was contended that if the value of these "articles was to be spread over the 24 flats, the fair proportion "of the value of such articles attributable to Flat No. 19 sub-"let to the respondent was 73*l.* (4.) That, having regard to "depreciation, a proper annual charge, in respect of the said "articles in the said flat and in the aforesaid common parts, "was 15 per cent. (5.) That in the premises, a proper notional "rent for Flat No. 19 in respect of the said articles in the flat "and of the suggested fair proportion of the articles in the "common parts was about 45*l.* per annum. (6.) That every "room in the said flat was equipped with ample points for "electric power. (7.) That the reception room in the said flat "was fitted with coal fires. (8.) That coal for the said fires "could be stored in the basement of the said block of flats "and would be delivered to individual flats by the head porter "provided and paid by the appellants. (9.) That for the 24 "flats aforesaid the appellants provided a head porter living "on the premises and two other porters on duty all day from "about 8.30 a.m. until about 8.30 p.m. (10.) That the said "porters called taxis, helped with tenants' luggage, received "and delivered parcels, adjusted radiators when necessary, "took messages and were available for the convenience of the "tenants. (11.) That the appellants provided fuel for the "water central heating systems at a cost of 980*l.* per annum "in respect of the said block of flats. It was contended that the "proper proportion attributable to the said flat was 20*l.* per "annum. (12.) That the appellants provided stokers for the "maintenance of the water central heating system at a cost of "490*l.* per annum in respect of the said block of flats. It was

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"contended that the proper proportion attributable to the said "flat was 10*l*. per annum. (13.) That the appellants provided "cleaners for cleaning the staircase, the back stairs and the "yard and for removing the tenants' bins to the yard from "whence the local authority collected them. (14.) It was "contended that the proper proportion of the wages of porters "and cleaners attributable to the respondent's said flat was "10*l*. per annum. (15.) That the appellants provided a "passenger lift in addition to one automatic passenger and one "hydraulic lift at the back of the said block. (16.) That the "appellants provided an internal telephone to each flat with "a switchboard in the hall for the tenants to communicate "with the porters if they should require their services. "(17.) That there was in addition a main telephone in the hall. "(18.) It was contended that the proper proportion of the cost "of cleaning materials, lift maintenance and telephone "attributable to the respondent's said flat was 10*l*. per annum. "(19.) That the appellants provided and maintained a "refrigerating plant from which the refrigerator in the "respondent's said flat was run. (20.) That the appellants "maintained at the back of the said block a garden and that "the proper proportion of the cost of upkeep of the garden "and of sundries attributable to the respondent's said flat was "2*l*. per annum. (21.) It was contended that the proper "proportion of the cost of providing the matters referred to "in paras. 8 to 20 inclusive attributable to the respondent's "flat was 52*l*. per annum. (22.) That the appellants paid the "rates of the said flat, amounting to 73*l*. per annum." Henn Collins J. gave judgment for the appellants on the ground that the use of the furniture in the flat was of the annual value to the respondent of 30*l*. and that this was a substantial proportion of 202*l*., which sum was the rent of the flat after 73*l*. had been deducted in respect of rates. The Court of Appeal (Morton, Somervell and Asquith L.JJ.) reversed this judgment holding that all the articles included in the respondent's sub-lease were furniture and that the flat was bona fide let at a rent which included payments in respect of furniture but that the amount paid by the appellants in respect of rates should not be deducted from the rent and that 30*l*. was not a substantial portion of 275*l*. because it was less than 15 per cent. They held, further, that the furniture in the common parts of the building must be disregarded and that the flat was not bona fide let at a rent which included payments in respect of attendance. The appellants appealed to the House of Lords.

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The two appeals were heard together.

Sir Valentine Holmes K.C. and *MacMillan* for the appellant Mrs. Palser.

W. H. Cartwright Sharp K.C., *Alexander Karmel* and *Denis Murphy* for the respondent Mrs. Grinling.

Sir Valentine Holmes K.C., *J. Scott Henderson K.C.* and *Raymond Stock* for the appellants Property Holding Co. Ld.

Walter Raeburn K.C. and *Hackforth-Jones* for the respondent Mischeff.

Sir Valentine Holmes K.C. for the appellants. The first point is whether in the first case the flat was " bona fide let at a " rent which includes payments in respect of attendance " within s. 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923, as amended, and s. 3, sub-s. 2 (*b*) of the Rent and Mortgage Interest Restrictions Act, 1939, and whether in the second case the flat was " bona fide let at a rent which " includes payments in respect of attendance or the use of " furniture " within the sub-sections. In both cases this requirement of the sub-section was fulfilled. They do not fall within the class of case in which the landlord puts a few sticks of furniture into the dwelling-house, when bona fides is absent from the transaction: see *Nye* v. *Davis* (1). In taking such lettings as these out of the ambit of the Rent Restriction Acts the legislature was recognizing that in the cost and value to the tenant of the provision of board and attendance and also in the depreciation of furniture there may be incalculable differences from time to time. Thus, while in the case of a simple letting of a dwelling-house the Acts provide for certain permitted increases of rent, lettings within s. 10, sub-s. 1 are taken out of the Acts altogether. Admittedly in establishing that these flats were bona fide let within the terms of s. 3, sub-s. 2 (*b*) of the Act of 1939, the onus is on the landlords: see s. 7, sub-s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. The next question is as to the meaning of the word " attendance " in the relevant subsection. This arises in both the appeals. In the first case (*Palser* v. *Grinling*) the services which in whole or in part constitute " attendance " are (*a*) the cleaning of the main entrance hall, staircases, landings and passages; (*b*) the provision of a porter to take in and carry parcels and goods and to give orders to tradesmen; (*c*) the provision of a porter to

(1) [1922] 2 K. B. 56.

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carry up coal to the flats and to take away refuse; (*d*) the provision of hot water. In the second case (*Property Holding Co., Ld.* v. *Mischeff*) the "attendance" includes (*a*) the cleaning and lighting of the parts of the building enjoyed in common, viz., the hall and the staircase; (*b*) the provision of hot water; (*c*) the provision of central heating; (*d*) the provision of refrigeration; (*e*) the provision of porters to perform sundry services of the kind for which porters provided by the landlords were available. In the first case it appears from cl. 2 (Q) and cl. 3 (A) of the lease and regs. 5 and 6 of the general regulations that the services in question are covenanted services. In the second case cl. 3 of the lessor's covenants provides for lighting and cleaning the staircase and landing, the maintenance of a hot water supply and central heating apparatus and the provision of a resident porter. There is no definition of the porter's duties but the lessor's undertaking must be understood as an undertaking to provide a porter to perform the services ordinarily performed by that class of servant. There is evidence as to the duties which the porter in fact performed, e.g., calling taxis, handling luggage and parcels, taking messages, etc. As to cl. 3 and 8 of the second schedule of the sub-lease, these are only intended to provide for the case when, apart from his proper duties, the porter might be sent on an errand by a tenant. "Attendance" implies an attendant but it is not necessary that he should appear at or in the flat and it need not involve any personal contact. The stoker lighting the boiler for the central heating is really performing the same services as a man who brought up the coal to a flat and lit the fire. The same is true of the hot water system which is in essence the same service as boiling the water in a pot downstairs and bringing it up to the flat. Thus attendance goes much further than merely carrying up coal and emptying bins. When there is a person in the building who is in fact doing work for the benefit and comfort of the tenant part of the rent is fairly attributable to the "attendance" of that person. There is no difference between "services" and "attendance." There is a definition of "services" in s. 12, sub-s. 1 of the Furnished Houses (Rent Control) Act, 1946. The next question, which arises in the second case only, is as to the meaning of "furniture." This is hard to define but any judge of fact can decide whether a particular article is "furniture." There is no reason to assume that only loose and not fixed furniture is referred to. For this purpose there is no antithesis between " furniture "and fixtures, which do not represent inconsistent ideas. An article may be none the less " furniture " although it is fixed. There are cases where the furniture of a ship has been taken out and fitted to furnish a house. A blind man might fix his furniture to the floor of his house so that he could walk about easily. A movable object is one that you can pick up but it may yet be necessary to remove a screw or two. In any event, whether a piece of furniture is fixed or loose, its provision will have exactly the same effect on the rent. The law as to the nature of furniture was properly stated in *Gray* v. *Fidler* (1). Moreover, there enters into the calculation, not only the furniture supplied within the flat but also that supplied in the hall and the parts of the building enjoyed in common. The tenant has the use of it just as he has the use of the stairs. In the case of a letting of such a flat as this in such a building there must be implied a covenant by the lessor not to alter the character of that building by removing from the hall the carpets, curtains, settees, etc. The next question is how to calculate " the " amount of rent which is fairly attributable to attendance or " the use of furniture, regard being had to the value of the same " to the tenant." The formula which the Court of Appeal laid down in *Palser* v. *Grinling* (2) is very complicated and is more difficult than applying the Act straightforwardly. The Court of Appeal was wrong in starting with the cost to the landlord of providing the services and then making deductions to find how far they are for the benefit of the tenant. The services here are of more value to the tenants than cost to the landlords. The value of the services will vary according to the type of tenant of the particular flat. To a tenement tenant in the East End of London it would not be of great value to have his coal carried up to his flat or his refuse removed from it ; this would be something he would be willing to do himself. But to a tenant of a " luxury " flat in the West End it would be of great value. In considering the value to the tenant one must look at the matter from the point of view of the sort of tenant who would take that sort of flat. The criterion is the value to the tenant, not the cost to the landlord. In *Palser* v. *Grinling* (3) some part of the rent must be attributed to the carrying up of coal, even though a tenant may have electric fires. Moreover, some part of the rent must be attributed to

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(1) [1943] K. B. 694, 700, 711–7.

(2) [1946] K. B. 631, 637.

(3) Ibid 631.

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the removal of refuse; this is not as much for the landlord's benefit as for the tenant's, for it is the latter's responsibility. The next question is as to the meaning of the phrase "sub-"stantial portion" and the final question as to the meaning of the phrase "the whole rent." These are bound up together. The first question, what amounts to a "substantial portion" is purely one of fact and the judge of fact must take into consideration the whole agreement, looking at it as a whole. He must look at the other obligations of the parties as to repairs, rates, etc. Moreover, inasmuch as Parliament has not fixed any percentages which are to be treated as "sub-"stantial", judicial interpretation of the Act ought not to fix percentages. The question is whether the portion of the rent attributable to attendance or the use of furniture can be regarded as substantial in comparison to the portion not attributable to it. Take two precisely similar flats, similar in the attendance provided and the furniture left for the tenant's use, these being worth 20*l.* a year; if the rent of one was 100*l.* a year and 30*l.* in respect of rates while the rent of the other was 100*l.* a year the tenant paying the rates, then if the Court of Appeal's formula of percentages were adopted the absurd result would be produced that in the case of one the 20*l.* would be "a substantial portion" of the "whole rent" but not in the case of the other. As regards the "whole rent," that is the rent named with a deduction in respect of rates where these are borne by the landlord. [He referred to *Barton* v. *Fincham* (1); *Wood* v. *Wallace* (2); *L. H. Woods & Co., Ld.* v. *City & West End Properties, Ld.* (3); *King* v. *Millen* (4); *Crane* v. *Cox* (5); *Wilkes* v. *Goodwin* (6); *Wood* v. *Carwardine* (7); *Rimmer* v. *Carson* (8); *Dick* v. *Duncan* (9); *Nadler* v. *Wilson* (10); *Barrell* v. *Fordree* (11); *Bell Property Trust, Ld.* v. *Hampstead Assessment Committee* (12); *Brown* v. *Robins* (13); *Maclay* v. *Dixon* (14); *Regent Estates & Co., Ld.* v. *Kernes* (15); *Engvall* v. *Ideal Flats, Ld.* (16); *Somershield*

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(1) [1921] 2 K. B. 291, 297.
(2) (1920) 90 L. J. (K. B.) 319.
(3) (1921) 38 T. L. R. 98.
(4) [1922] 2 K. B. 647.
(5) (1923) 92 L. J. (K. B.) 544.
(6) [1923] 2 K. B. 86, 92.
(7) [1923] 2 K. B. 185.
(8) (1923) 39 T. L. R. 349.
(9) (1923) 92 L. J. (Ch.) 320.
(10) (1924) 40 T. L. R. 639.
(11) [1932] A. C. 676, 682.
(12) [1940] 2 K. B. 543.
(13) (1943) 168 L. T 340.
(14) (1943) 170 L. T. 49.
(15) (1944) Estates Gazette, p. 575.
(16) [1945] K.B. 205; 172 L. T. 134.

v. *Robin* (1) and *Artillery Mansions, Ld.* v. *Mabartney* (2).]

J. Scott Henderson K.C. for the appellants Property Holding Co. Ld. In the second case, as regards " attendance," there is nothing in the lease to suggest that this must be given in the flat. One must look at the agreement and its subject matter as a whole in construing this word, considering the type of flat, the rent payable and such circumstances as the provision of an internal telephone in each flat to communicate with the porters if their services were required. As regards the use of furniture, this is not confined to the flat either. It includes the furniture in the hall and corridor. The tenant has none the less the use of it because it is shared with others. In no previous case has the value of the provision of attendance and the use of furniture to the tenant been based on cost to the landlord. If the appellants are right, the tenants are not left without protection, since the lettings come within the jurisdiction of the rent tribunals: see *R.* v. *Hampstead and St. Pancras Furnished Houses Rent Tribunal* (3).

W. H. Cartright Sharp K.C. for the respondent Mrs. Grinling. In the first case the amount of the rent of the flat attributable to attendance, regard being had to the value of the same to the respondent, was not a substantial portion of the whole rent of the flat, which was 175*l.* The cleaning of the entrance hall, forecourts and passages does not fall within the description of attendance, nor does the supply of hot water through pipes. The definition of " services " in s. 12, sub-s. 1 of the Furnished Houses (Rent Control) Act, 1946 treats " attendance " as being different from other things mentioned, " the provision of " heating or lighting, the supply of hot water." The receipt by the porter, in accordance with reg. 5, of goods or parcels from tradesmen, instead of their delivery by the tradesmen to the respondent's flat was not attendance, certainly not attendance which was of any value to the respondent. In any event, not more than 100*l.* of the 340*l.* paid to the porter as remuneration is attributable to the performance of the duties alleged to constitute " attendance." Dividing the 100*l.* among the tenants in the same proportion as the rateable value of the block of flats bears to the rateable value of each flat, about 2*l.* only is the share fairly attributable to this respondent. The Court of Appeal were not wrong in dealing with the matter in terms of proportions. Under the Rent Restriction Acts there

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(1) [1946] K. B. 244.
(2) [1947] K. B. 594.
(3) [1947] K. B. 973.

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is no distinction between "portion" and "proportion." The question of what was "substantial" as attendance did not arise before the Act of 1923. Then the test whether the rent included payments in respect of attendance or use of furniture, was satisfied by any amount of attendance or furniture provided it was not excluded by the rule de minimis non curat lex: see *Wilkes* v. *Goodwin* (1). The language and the law were changed in 1923 and what is negligible is not so minute. "Substantial" indicates a matter of real substance, far more than that which could formerly have been disregarded. Nothing less than 10 per cent. of the rent can be substantial; anything over 50 per cent. must be substantial. In between is the debatable field, in which the decision must be reached by the tribunal of fact.

Walter Raeburn K.C. for the respondent Mischeff. On the facts this respondent became in fact the lawful assignee of Trevor's lease and this is not a sub-demise. Further, on the true construction of s. 15, sub-s. 3 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it is immaterial whether the mesne tenant's term was prematurely determined or came to an end by effluxion of time. The words "lawfully "sub-let" were meant to exclude a tenant put into the premises in breach of covenant. At common law and leaving out the Rent Restriction Acts, if a tenancy was determined that was the end of the sub-tenancy also, but the sub-section saved the man in possession creating a direct relationship between him and the landlord. This is a question considered neither by the judge of first instance nor by the Court of Appeal. [He referred to *Milmo* v. *Carreras* (2) and *St. Aubyn* v. *St. Aubyn* (3).] The respondent being the tenant of the flat, this is not a dwelling-house bona fide let to her at a rent which includes payments in respect of attendance or the use of furniture, as defined by the Acts. When the whole rent includes payments in respect of attendance or the use of furniture, the court, in considering whether the amount attributable to these represents a substantial part of that rent, must determine (*a*) the amount of the whole rent fairly attributable to those benefits; (*b*) any modification of that amount, having regard to the value of those benefits to the tenant, and (*c*) what portion of the whole rent the amount so modified represents. Where, as in this case, there has been no apportionment the first problem is:

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(1) [1923] 2 K. B. 86, 92.
(2) [1946] K. B. 306.
(3) (1861) 1 Dr. & Sm. 611, 618.

What, on any showing, can, on the facts of the case, be attributable to attendance or use of furniture. One possible approach would be to determine what the tenant would be prepared to pay separately for (*a*) attendance, (*b*) use of furniture and (*c*) the unfurnished demise. In the present case, as regards attendance, none of the amenities relied on by the appellants constituted attendance within the meaning of the Acts. To supply hot water through pipes, whether for central heating or for domestic purposes, does not constitute attendance. The limitations expressed in the sub-lease on the duties of the porter prevent his provision from amounting to attendance. Altogether, there was no evidence on which the judge was entitled to hold that if any of these were attendance, the rent fairly attributable to it would form a substantial part of the whole rent. As regards the ascertainment of the value of the use of furniture, it is not enough to find what it may have cost the landlord or the hypothetical value to the tenant. The attribution of value must relate those facts to the actual circumstances of the particular case. What is material to be considered is, not only whether there is furniture in the dwelling-house, but whether the rent includes a payment in respect of its use within the meaning of the Act. There may be articles in a dwelling-house in respect of which no payment is included in the rent: (*a*) Articles which are prima facie part of the freehold should not be treated as outside the scope of the rent paid for the premises themselves. (*b*) Other articles may not be covered by the rent at all because the landlord has provided them voluntarily and without any contract or obligation or else has provided them under quite a separate contract outside the tenancy agreement. (*c*) Again, there may be articles the use of which has been expressly let collaterally with the demise, the use of them being contractually treated as over and above the demise. As regards the question what articles fall within the description of " furniture," it is not necessary in this case to define furniture generally. That must be decided in relation to the habits and customs of people at different times, so that in the Rent Restriction Acts it covers what is ordinarily and currently understood to be furniture. Floor coverings, kitchen cupboards and mirrors are not furniture. A refrigerator is no more " furniture " than a radiator ; it is just the bridgehead of the freezing system, the power to operate which comes from outside the flat. Fixtures cannot be " furniture " for the purposes of these Acts, although for certain other purposes they

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may be so called. In the law of landlord and tenant what passes with the demise is well established and in this connexion one should anchor oneself to that, considering the damage that removal would inflict on the structure and how far it would need to be made good. These Acts were not meant to disregard the question whether any given articles were fixtures annexed to the hereditament or were detachable pieces of furniture. In distinguishing between furnished and unfurnished premises, they were designed to control premises where a tenant introduced his own furniture but to exclude those where the landlord had his own furniture and required a payment for the use of it. In the case of a conveyance, articles annexed to the freehold would pass under it—built-in cupboards or book shelves as well as baths or lavatory seats. Nothing can be included in the term " furniture " for the purposes of these Acts which would so pass. If objects annexed to the freehold could be so described the absurd situation would arise that the rent would include a payment in respect of that " furniture " as part of the demise and a further payment in respect of it as a separate item. In *Gray* v. *Fidler* (1) the dissenting judgment of Lord Greene M.R. was right and should be upheld and the decision of the majority was wrong in that it is not irrelevant to consider whether articles are fixed and in what degree they are fixed, if they are in the ordinary sense furniture. [He also referred to *Holland* v. *Hodgson* (2); *Jordan* v. *May* (3); *Leigh* v. *Taylor* (4) and *Colegrave* v. *Dias Santos* (5).] Moreover, " furniture " within these Acts must be furniture in the demised premises. If a flat was let unfurnished but the tenant was allowed the use of furniture in the entrance hall that would not make the flat furnished premises. On the question of value to the tenant, the judge of fact must ask himself how much extra the tenant has been content to pay by way of rent for the benefit of using the landlord's furniture in the dwelling-house. In each case he has before him a particular rent and particular parties. There are three advantages for which the tenant is to be presumed to pay: (*a*) He will not have to provide his own furniture pro tanto. (*b*) The burden of wear and tear of the furniture falls on the landlord. (*c*) The tenant is spared the cost of removal in going in and out. On the other hand the tenant has the disadvantage of losing the protection of the Acts in taking furnished premises and, accordingly, he may pay less for them: see *Seabrook* v. *Mervyn* (1). The judge of fact must also consider the value to the particular tenant. If he made it clear that he was not anxious to use some of the furniture (e.g., a piano, when he was not interested in music) then in assessing the value to him the court could not altogether disregard as a factor the fact that he did not want it and had no intention of using it. In estimating the value of the furniture in this case the judge did not proceed on the correct basis. In taking the replacement prices, he did not have regard to the fact that it was not new. When the respondent went into the flat in 1942 this furniture had already had five years' wear and the basis of valuation had regard neither to its age nor to its condition. On mere evidence of replacement value as new, the court cannot fairly attribute a portion of the rent to the use of this alleged "furniture"; there was no evidence what would have been the rent of the flat without it. On the right principles a far lower figure must be arrived at—one which would not represent a substantial part of the rent—and accordingly the case ought not to be sent back to the judge. By the Act of 1923 Parliament anchored the word "substantial" to a specific standard, viz., the "whole rent," thus seeking to provide a way out of the dilemma by which otherwise either the county court judges would have been left to follow what had been decided on the facts in cases which happened to have been reported or each judge would have had to make his own standard. Parliament might have fixed a definite percentage but the matter was left for judicial determination. What percentage is to be regarded as substantial should not vary greatly up and down the country and the suggestion that 15–20 per cent. should be the borderline is fair and better than leaving the matter at large. In regarding the "whole rent" it is not permissible to make any deductions from the amount reserved in the demise, whether in respect of a portion attributable to the payment of rates or otherwise. Summing up: No portion of the rent is fairly attributable to attendance. The value fairly attributable to the use of furniture did not form a substantial part of the whole rent. A negligible portion or none of this rent is fairly attributable to the use of furniture. The judge received no evidence on which the value of the furniture could be found. Alternatively, if there was sufficient evidence on which to reach that value,

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(1) [1943] K. B. 694, 708–9.
(2) (1872) L. R. 7 C. P. 328, 334.
(3) [1947] K. B. 427.
(4) [1902] A. C. 157.
(5) (1823) 2 B. & C. 76.

(1) [1947] 1 All E. R. 295.

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he adopted the wrong method of computation and as a result greatly over-assessed the value. The reduced value must be a figure which could not be a substantial part of the whole rent.

Sir Valentine Holmes K.C. in reply. As to the meaning of "substantial", the value of the attendance and the furniture to the tenant is a question of fact in each case, taking all the factors into consideration. If a system of percentages is to be adopted it must be laid down by statute. As to the question of furniture in the second case, if an article is bult in so as to be immovable without damage to the structure, it is not "furniture," because it would not be understood to be so. In *Gray* v. *Fidler* (1) it appears that the articles were not fixed in a permanent way. Mere screwing to the structure does not make a thing cease to be "furniture." Pictures remain chattels even though they may be screwed to the walls instead of being hung. The test is: Would anyone looking at the article say that it was part of the dwelling-house or that it was "furniture?"

THE HOUSE took time for consideration.

Dec. 19. VISCOUNT SIMON. My Lords, these two appeals were heard together. Both appeals involve the construction and appliation of certain provisions of the Rent Restriction Acts, and especially of s. 3, sub-s. 2 (*b*) of the Rent and Mortgage Interest Restrictions Act, 1939, and s. 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923, as amended by sch. I. to the said Act of 1939. These sections are as follows: Section 3, sub-s. 2 (*b*) of the Act of 1939 provides: "The "principal Acts" (i.e., the Rent and Mortgage Interest Restrictions Acts, 1920–1925) "shall not, by virtue of this "section, apply . . . . (*b*) save as is expressly provided "in the said Acts, as amended by virtue of this section, "to any dwelling-house bona fide let at a rent which "includes payments in respect of board, attendance or "use of furniture . . . ." Section 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act of 1923, as amended, provides: "For the purposes of para. (*b*) of "sub-s. 2 of section 3 of the Rent and Mortgage Interest "Restrictions Act, 1939 (which relates to the exclusion of "dwelling-houses from the principal Act"—i.e., the Act of 1920—"in certain circumstances), a dwelling-house, shall

(1) [1943] K. B. 694, 697, 708, 714.

"not be deemed to be bona fide let at a rent which includes "payments in respect of attendance or the use of furniture "unless the amount of rent which is fairly attributable to the "attendance or the use of furniture, regard being had to the "value of the same to the tenant, forms a substantial portion "of the whole rent." It is convenient also to recite, in connexion with the second appeal, sub-s. 3 of s. 15 of the Act of 1920, which is as follows: "Where the interest of a tenant "of a dwelling-house to which this Act applies is determined, "either as the result of an order or judgment for possession "or ejectment, or for any other reason, any sub-tenant to "whom the premises or any part thereof have been lawfully "sub-let shall, subject to the provisions of this Act, be deemed "to become the tenant of the landlord on the same terms as "he would have held from the tenant if the tenancy had "continued."

In *Property Holding Co., Ld.* v. *Mischeff* the respondent contended that as a result of (*a*) the exercise by him of his option to continue the tenancy which he held from Trevor—which had the result that his term would not expire till September 25, 1944; coupled with (*b*) Trevor's subsequent exercise of his option to determine his lease—which had the result that Trevor's lease determined on March 24, 1944—the sub-lease to the respondent operated as an assignment to the respondent of the lease to Trevor. If the respondent was right in this, the year as at which the furniture should be valued would be 1937 and not 1942. But there is no substance in this contention. At the date of the transaction with the respondent, there was vested in Trevor a term which extended to March, 1951, and therefore left him a reversion expectant on the respondent's sub-tenancy, whether or not the respondent exercised his option to continue his tenancy. The respondent therefore duly became sub-tenant of Trevor. The sub-lease to the respondent embraced exactly the same subject-matter as the lease to Trevor and the lease and the sub-lease were in substantially identical terms. These circumstances were not relied upon by the respondent as a ground for distinguishing *Prout* v. *Hunter* (1), and it was not contended that in the light of sub-s. 6 of s. 12 and sub-s. 3 of s. 15 of the Act it was the tenancy to Trevor and not the sub-lease to the respondent which was the material tenancy to be considered. I express no opinion on the question whether that contention might have succeeded. The point was not raised, and in the circumstances the case must be dealt with on the footing that the sub-lease was the material tenancy. In this second case, therefore, the matters to be determined arise from the appellants' contention that the rent included such payments in respect of (*a*) attendance or (*b*) use of furniture, as formed a substantial portion of the whole rent, and thus took the flat outside the Rent Restriction Acts. The language of s. 10 raises some doubt in cases where a payment for attendance and a payment for the use of furniture are both included in the rent. Should the two payments be added together in order to determine whether the total forms a substantial portion of the whole rent, or should each payment be so tested in turn? For example, if the figure fairly attributable to attendance was 20*l.* and the figure fairly attributable to the use of furniture was 25*l.* would the matter be disposed of by saying that neither of these figures forms a substantial portion of the whole rent, or would the proper question be whether, when the two figures are added together, 45*l.* forms a substantial portion of the whole? The latter appears to be the better construction, for the section calls for the determination of one amount even though both elements are present.

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(1) [1924] 2 K. B. 365; C. A. 736

Taking these two cases as examples of the difficulties which arise in construing and applying the sections set out at the beginning of this opinion, it appears that there are six questions with which it is useful to deal.

(1.) *What is the meaning of the phrase "bona fide let at a rent "which includes payments in respect of board, attendance or use "of furniture?"* In my opinion "*bona fide*" in this phrase governs the whole of the words which follow. The words amount to a stipulation that the rent to be paid genuinely includes payments in respect of board, attendance or use of furniture: the Act is not to be evaded (as Shearman J. pointed out in *Nye* v. *Davis* (1)) by a merely colourable use of words which do not correspond with what is really provided. Of course, so far as regards attendance or use of furniture, the further test contained in s. 10, sub-s. 1 of the Act of 1923 is also imposed.

(2.) *What is attendance?* It means service personal to the tenant performed by an attendant provided by the landlord in accordance with his covenant for the benefit or convenience of the individual tenant in his use or enjoyment of the demised premises. "Service" is a wider word than attendance. Attendance, being personal in its nature, may be dispensed with by an individual tenant at his pleasure, though it is not on that account excluded from what the tenant pays for when the landlord has covenanted to supply it. But services common to others (e.g., the heating of a communal water supply, or the cleaning of passages, halls, etc., outside the demised premises) will not constitute attendance. It follows from the above that a landlord's covenant to supply someone to carry up coals to a flat or to carry down refuse from the flat is a covenant to provide attendance. Similarly, the provision of a house-maid or valet to discharge duties in connexion with the flat would be the provision of attendance, but a covenant by the landlord to provide a resident porter or housekeeper for a block of flats would not. In this last connexion it might be well to point out that in the English language "porter" is not one word, but two distinct words—two words of the same sound and spelling, but of different meaning and derivation, which may be confused. Sometimes "porter" means a door-keeper or janitor, and is derived through medieval French from the Latin noun *porta*. The Porter in Macbeth, or Cerberus as the Porter of Hades, was a porter in this sense. The second word means someone who carries things (e.g., a railway porter) and is derived from the Latin verb *portare*. There can be no doubt that the "porter" often to be found at the entrance of a block of flats is a porter within the first meaning, in the absence of a special covenant by the landlord that the porter shall carry things. It may be that on occasion he does some carrying for tenants, but unless this is provided in the lease, he does this, not because the landlord has covenanted to provide a person to carry, but as a private service for which he may reasonably expect from time to time some private remuneration.

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(1) [1922] 2 K. B. 56, 59.

In *Mischeff's* case, the position of the porter when rendering services to the lessee is put beyond doubt by the second schedule of the lease quoted above, for this provides that the porter shall be under no obligation to furnish attendance or other use of his service to occupiers for their private convenience, and that service rendered to the lessee by the porter shall be considered as rendered by him as the servant of the lessee. The porter of a block of flats, therefore, does not provide "attendance" in respect of which payment is included in the rent unless the landlord covenants that he shall render personal service to the tenant involving attendance at the individual flat.

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The above view of the meaning of the word "attendance" in the statute is in accord with what was said by Lord Greene M.R., in *Engvall* v. *Ideal Flats, Ld.* (1), approving *Nye* v. *Davis* (2), *King* v. *Millen* (3) and *Wood* v. *Carwardine* (4).

(3.) *What is the meaning of "furniture?"* This is not an easy question to answer with precision, and it is well to clear the ground by some preliminary observations. Inasmuch as the question involves the interpretation of the relevant enactments, the first comment to be made is that the terms of the contract of tenancy are not conclusive as to the proper application of the term: that is to say, "furniture" has a statutory meaning, and that meaning cannot be extended merely because the landlord stipulates in the lease that certain things are to be regarded as "furniture" when in fact they do not fall within the proper interpretation of the word. Secondly, "furniture" must, of course, consist of articles in which the landlord has a proprietary right as against the tenant. Thirdly, the expression "use of furniture" in s. 10, sub-s. 1 of the Act of 1923 refers to articles provided for the use or enjoyment of the dwelling in question. Articles provided for the use or enjoyment of places outside the demise, such as halls and passages used in common with other tenants in a block of flats, are excluded. Proceeding from this basis, it is further to be observed that s. 10, sub-s. 1, so far as it refers to rent for the use of "furniture," plainly contemplates that the whole rent paid is divided, actually or notionally, into a portion which is rent for the dwelling-house itself, and another portion, which must be substantial, which is rent fairly attributable to the use of "furniture." "Furniture," therefore, in the section, cannot include anything which is already paid for by the portion of the rent attributable to the dwelling-house itself; otherwise there would be, pro tanto, a payment twice over for the same things. It follows that in arriving at what is "furniture" for this purpose it is necessary to exclude articles which, at the beginning of the demise, constituted part of the dwelling-house itself. A further necessary test is that, of articles provided for the use or enjoyment of the dwelling-house, only those which are commonly and currently regarded as "furniture" can rank as such. The modern bath fitted into a bathroom, or the heavy cellar lid which keeps its position by its own weight, are examples of what is not " furniture." They are supplied for the use or enjoyment of the premises, but to-day no one would think of describing either as a piece of furniture. It was otherwise with the old-fashioned bath tub. Tables and chairs, of course, are " furniture," but a corner seat fixed solidly into a corner and forming in fact part of the building would not be. In most cases, articles of " furniture " are loose and can be moved about. (Compare the derivation of " *meubles* " from " *mobilia* ".) But this is not always so, and the main difficulty in arriving at a precise interpretation of the statutory expression arises when the article is in some degree attached to the premises.

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(1) 172 L. T. 134, 136, 137.

(2) [1922] 2 K. B. 56.

(3) [1922] 2 K. B. 647.

(4) [1923] 2 K. B. 185.

The problem in this latter case was much discussed in the Court of Appeal in *Gray* v. *Fidler* (1), where MacKinnon and Du Parcq L.JJ. differed from the minority judgment of Lord Greene M.R. Lord Greene would have resolved this difficulty by excluding from " furniture " all fixtures that would pass with the demise; and on this basis he would have regarded as part and parcel of the dwelling-house not only such features of the design of the premises as fitted wardrobes and fitted bed-cupboards, but also such articles as electric-light fittings with their shades and lamps. MacKinnon and Du Parcq L.JJ., on the other hand, refused to accept the proposition that fixtures (in the sense of things affixed to the freehold) could not be furniture for the purposes of the section or to regard movability as in itself a test. They considered that " furniture," in the statutes under discussion, must be given its ordinary popular meaning and, in the result, they held that fitted wardrobes and bed-cupboards, as well as other objects, apparently more readily detachable, were " furniture." In my opinion the correct view of the requirements of s. 10, sub-s. 1 does not precisely correspond with either the majority or the minority view in *Gray* v. *Fidler* (1). As Lord Greene M.R. points out (2): " In the development of constructional " technique many articles which formerly used to be provided " as furniture by a tenant have become part of the fixed equip-" ment provided by the landlord." In seeking where to draw the line between the fabric of the building and its furniture for the purposes of the section it is difficult to suppose that the legislature intended to marshal as furniture objects—such as built-in wardrobes and cupboards—which, though performing

(1) [1943] K. B. 694.
(2) Ibid. 706.

the functions of conventional furniture, could only be detached at the cost of altering the design or arrangement of the building or of appreciable damage to it or themselves. Nor is it easy to think that " furniture " can include a fixture which on detachment becomes so altered as to lose the utility it previously possessed, as, for example, a table affixed to the wall and depending for support on a wall-bracket. On the other hand, however, it is no less difficult, having regard to the obvious intendment of the section, to suppose that the legislature in speaking of the " use of furniture " meant to recognize the law of real property to the extent of excluding from " furniture " each and every fixture whatever the nature and degree of its attachment. In my opinion the true view is that articles belonging to the landlord otherwise entitled to rank as " furniture " for the purposes of s. 10 should, if affixed to the fabric, be regarded as part thereof if they cannot be detached without appreciable damage to or alteration of the fabric or themselves; otherwise they should be regarded as furniture. To sum up, the first question is whether the articles in question are commonly regarded as " furniture "; if so, loose articles are necessarily included in the expression, while articles which are not loose will or will not be furniture according to the nature and degree of attachment as above indicated.

(4.) Now comes the question of how to arrive at " *the amount of rent which is fairly attributable to attendance or the use of furniture, regard being had to the value of the same to the tenant.*" It is convenient first to observe that the " amount of rent " is equivalent to " the portion of the whole rent." " Of the same " refers to the attendance or the use of furniture or to both together when both are provided. A question of some difficulty arises as to the meaning of the " tenant "—does the expression refer to the particular individual whose lease is in question, or does it refer to the average or normal tenant of that class of property? I think the phrase refers to the actual tenant whose lease is under examination. It is the analysis of the particular transaction to which he is a party that is the subject matter of the inquiry. It is the value to him (and included in that value is the fact that he may assign or sub-let) which must be taken into account. But in taking this view, it is of the utmost importance to observe that the section directs that " regard shall be had " to the value to the tenant, and not that the value to such tenant is to govern the calculation absolutely. In the recent case of *Newport Borough Council* v. *Monmouth-*

shire County Council (1) where this same phrase, "regard shall "be had to," fell to be interpreted, I pointed out that such a direction called for the exercise of a broad judgment, and that any arithmetical conclusion was qualified by what is deemed to be fair and reasonable. In the present case the direction that regard is to be had to the value to the tenant, i.e., that such value must not be overlooked but must be suitably allowed for, is made clear by the main direction that the amount of rent is to be such as "is fairly attributable to" the item in question. Other factors have to be duly weighed and allowed for. In some cases the parties to the lease may themselves have placed a value upon various elements which enter into the total rent. Even so, the statement of these respective values in the lease is not a conclusive distribution, though it may be strong evidence of what the proper distribution would be. Nevertheless, the amount to be arrived at is the amount which is "fairly attributable" to the item, not the amount which is actually attributed to it in the lease. The phrase "having "regard to" etc., appears to be introduced in order to exclude or discount articles included in the let which are left on the premises by the landlord either for his own convenience (for example, as a convenient way of storing them without paying a storage charge) or in quantities which, having regard to the size of the flat and the tenant's need for furniture, are greater than the tenant wants. If a landlord insists on letting a three-roomed flat with the use of a number of chairs and tables in excess of what the tenant of such a flat can reasonably need, then the phrase under discussion will limit the rent for the use of such articles to this need. In the same way, the judge of fact may have to consider what is the value to the tenant of pictures which the landlord insists on leaving on the walls of the dwelling-house, and what is the amount of rent which is fairly attributable to the tenant's use and enjoyment of them.

A number of factors may be relevant in arriving at the proper figure. The governing consideration is the word "fairly." The questions involved are to be answered by common-sense considerations rather than by any formula which can be laid down by this House. In assessing "the amount of rent which "is fairly attributable" to the use of furniture, a chief consideration is that if and so far as the landlord does not provide furniture which the tenant would normally require to use, the tenant would have to provide

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(1) [1947] A. C. 520, 534.

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it himself. It is the value to the tenant of the landlord's covenant to provide furniture which mainly controls the figure to be arrived at, and not the cost of such furniture to the landlord, though the latter in many cases may also be a relevant factor. If the tenant provided the furniture himself, he would have to suffer the loss due to wear and tear, whereas if the landlord provides the furniture, the burden of wear and tear (in the absence of an express covenant) falls on him. On the other hand, it must not be overlooked that when the landlord lets the use of furniture he does not, apart from special agreement, undertake to repair it, or to renew it from time to time when it becomes worn out. If the furniture is not new, what the tenant gets is not more than the use of it during the term for what remains of its life. A table that is " on its last legs " is not usable when it collapses, and the landlord does not undertake to provide it with new legs or to furnish a new table. For this reason, it is incorrect to start a calculation of the value to the tenant of furniture which has already been considerably used, by taking a figure representing the price of brand-new furniture at the date of letting. What the judge of fact has to do is to take the furniture as it is and to fix a fair rental for it, having regard to its value to the tenant, remembering that old furniture wears out sooner than new and that the landlord (apart from special covenant) does not undertake to repair or renew it. These balancing considerations are not capable of being precisely quantified and the judge of fact has in the end to arrive at a figure which he considers in the result fairly allows for the relevant matters to be taken into account. As already observed, an agreement which lists certain articles as " furniture " does not prove that they are furniture within the meaning of the section ; their nature must be judged according to the facts and not simply by admissions in the documents. Where the word " furniture " is never used in an agreement, but the reference in the agreement is to " landlord's fixtures," some of which are in an agreed list (as in *Mischeff's* case), this does not establish that the articles are not furniture. The words of the section have to be applied according to their proper meaning and an agreement between the parties as to their application in a particular case is not conclusive, though it may be some evidence of the fact.

(5.) *What does " substantial portion " mean ?* It is plain that the phrase requires a comparison with the *whole rent*, and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. "Substantial" in this connexion is not the same as "not "unsubstantial," i.e., just enough to avoid the "de minimis" principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord. If the judgment of the Court of Appeal in *Palser's* case were to be understood as fixing percentages as a legal measure, that would be going beyond the powers of the judiciary. To say that everything over 20 per cent. of the whole rent should be regarded as a substantial portion of that rent would be to play the part of a legislator: if Parliament thinks fit to amend the statute by fixing percentages, Parliament will do so. Aristotle long ago pointed out that the degree of precision that is attainable depends on the subject matter. There is no reason for the House to differ from the conclusion reached in these two cases that the portion was not substantial, but this conclusion is justified by the view taken on the facts, not by laying down percentages of general application.

(6.) *What is the "whole rent?"* As already indicated, it is the entire contractual rent payable by the tenant to his landlord. In cases where the landlord covenants to pay rates, it would be an error to deduct the rates from the contractual rent in order to arrive at the whole rent. Whether the landlord pays the rates or not is immaterial in arriving at the whole rent. In *Palser* v. *Grinling* (1), Lord Goddard C.J. deducted the rates (which the landlord had to pay) from the contractual rent of 175*l.*, but the Court of Appeal rightly corrected this. Morton L.J. said (2): "It is wrong for the judge to deduct the "rates from the rent—in cases where the rates are paid by the "landlord—and then to compare the amount of rent fairly "attributable to the attendance with the figure so arrived at. "The section refers to the *whole* rent, and I think there is clear "authority for the proposition that in ascertaining the whole "rent it is not legitimate to make any deduction on account of "rates: see *Somershield* v. *Robin* (3)." Inasmuch as a sum

(1) [1946] K. B. 631.
(2) Ibid. 641.
(3) [1946] K. B. 244.

may be a substantial portion of a given figure, though it would not be regarded as a substantial portion of a larger figure, this distinction may be important in some cases, though it does not seem to make any practical difference in the two cases now before the House.

It now only remains to apply the above propositions and interpretations to the two cases actually before us.

In *Palser* v. *Grinling* no dispute as to furniture arises, and the only question is whether, out of a total rent of 175*l.* there was a substantial portion paid in respect of attendance. Neither the appellant's covenant to keep the entrance hall, staircases and passages clean, nor to keep the lift in working order, nor to provide a supply of hot water, constitutes attendance. Neither does the provision of a resident porter, to be in charge of the main entrance-door of the flats at Chantrey House, constitute attendance on the respondent. The only element that can be regarded as attendance is the service of the porter, as stipulated in the lease, in carrying up coals to the respondent's flat and in removing refuse therefrom. What is the portion of the total rent of 175*l.* which is fairly attributable to this attendance, and is this portion substantial? The total remuneration received by the porter from the appellant (including the rental value of the flat with which he was provided) was about 340*l.* The main duties of the porter are downstairs, where he has many things to do throughout the day as the servant of the landlord; the carrying of coal up to the tenants and the removing of refuse can only be an incident in his main work. Nevertheless, the evidence offered to the Lord Chief Justice by the appellant sought to divide the total remuneration received by the porter among the twenty-four flats and to treat the respondent as paying for one twenty-fourth of the whole. This cannot be right, for it would be be regarding the engagement of the porter by the appellant as solely for the benefit of the tenants, and as though he had nothing to do except to carry up coals and remove refuse. Mr. Cartwright Sharp argued that no more than 100*l.* out of the 340*l.* could be attributed to the duties in question. Assuming this, and dividing the 100*l.* among the tenants in the same proportion as the rateable value of the block of flats bears to the rateable value of the flat in question, he arrived at something like 2*l.* as the share fairly included in the respondent's rent. Even if the 100*l.* were equally spread among all the flats, the respondent's share would be little more than 4*l.* On either

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of these calculations the figure cannot be regarded as a substantial portion of the total rent. Even if 14*l*. was the correct proportion, I should still support the Lord Chief Justice's view that this was not enough to be a " substantial portion." The Lord Chief Justice recognized that the services of the porter were not solely for the tenants' advantage, but he put this on the limited ground that the removal of refuse is also to the advantage of the landlord. A broader view is fully justified, viz., that the greater part of the services of the porter were services rendered to the landlord which did not involve any attendance upon the tenants at all. On the other hand, the Lord Chief Justice, following *Engvall* v. *Ideal Flats, Ld.* (1), held that in as much as the respondent did not require the services of the porter for carrying up coals because she was not using coal fires, the portion of the whole rent which was fairly attributable to the porter's attendance for this purpose would be reduced. This does not seem to be the case, for the tenant who has contracted to pay rent for attendance which the landlord covenants to supply cannot reduce the proportion of the rent fairly attributable to such attendance by saying that, though he is entitled to have it, he does not want it. The result in *Palser's* case is that the attendance provided by the appellant and paid for in the total rent was not such as to make the figure which may be fairly attributable to it a substantial portion of the whole rent. The appeal therefore fails, and the respondent's counterclaim succeeds.

In *Property Holdings Co., Ld.* v. *Mischeff* the various items claimed to be attendance are not " attendance " as above defined at all. They are either services rendered voluntarily by the porter, or else services under the lessor's covenant which do not involve personal attendance. There remains the question of furniture, as to which some detail is necessary. Applying the principles which have been set out above to the situation disclosed in the evidence, it appears that the kitchen cabinet was built in to the fabric and constituted part of the flat itself. The refrigerator got its necessary electric current through a plug in the wall which could be withdrawn without injury. It could thus be moved out of the flat, when the electric plug was withdrawn, as a loose article, and the trial judge was justified in regarding it as furniture. The judge has taken the same view about the linoleum and rubber floor covering, and

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(1) [1945] K. B. 205; 172 L. T. 134.

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though the evidence is not entirely clear as to whether in the present case these were detachable (as they often are), there seems no reason to reject the judge's view. He also treated the fitted medicine chest as coming within the category of furniture; there is not much evidence about it and the decision depends, of course, on the facts. In the circumstances there is no reason to overrule this view. This leaves in the category of furniture articles to which the learned judge attributed the value of 155*l.* in June, 1942. Even if the method followed by the trial judge be accepted, 15 per cent. of this is approximately 23*l.* and there is no reason to disturb the learned judge's conclusion that this does not amount to a substantial proportion of the total yearly rent of 280*l.* 5*s.* 0*d.* The result is that the appeal in *Property Holding Co., Ld.* v. *Mischeff* should also be dismissed.

My Lords, my noble and learned friend, LORD UTHWATT, who is unable to be here to-day, authorizes me to say that he concurs in this opinion.

LORD THANKERTON: My Lords, I desire to express my concurrence in the reasoning and the conclusions of the opinion just delivered by my noble and learned friend on the woolsack.

LORD PORTER. My Lords, I also concur.

LORD MACDERMOTT. My Lords, I also agree.

Appeal dismissed.

Solicitors for appellant Palser: *Griffinhoofe & Brewster.*

Solicitors for respondent Grinling: *Lipton & Jefferies.*

Solicitors for appellants Property Holding Co. Ld.: *Markby, Stewart & Wadesons.*

Solicitors for respondent Mischeff: *J. M. Menassé & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*

1948

Jan. 26, 27, 29; Feb. 27.

NUGENT-HEAD . . . . . . APPELLANT;

AND

JACOB (INSPECTOR OF TAXES) . . . RESPONDENT.

Revenue — Income tax — Married woman — "Living with her "husband"—"Living . . . separate from her husband"—Income from property outside the United Kingdom—Assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 16.

By r. 16 of the All Schedules Rules in the Income Tax Act, 1918: "A married woman acting as a sole trader, or being entitled to any "property or profits to her separate use, shall be assessable and "chargeable to tax as if she were sole and unmarried: Provided "that (1.) the profits of a married woman living with her husband "shall be deemed the profits of the husband and shall be assessed "and charged in his name, and not in her name or the name of her "trustee; and (2.) a married woman living in the United Kingdom "separate from her husband, whether the husband be temporarily "absent from her or from the United Kingdom or otherwise, who "receives any allowance or remittance from property out of the "United Kingdom, shall be assessed and charged as a feme sole if "entitled thereto in her own right, and as the agent of the husband "if she receives the same from or through him, or from his property "or on his credit."

Proviso 1 deals with the case where there has been no matrimonial rupture and the wife is "living with her husband," albeit that, for one reason or another, he is away from her for a considerable period of time. Proviso 2 deals with the contrasted case where there is a rupture in matrimonial relations and the wife is "living in the United Kingdom separate from her husband."

Decision of the Court of Appeal [1947] K. B. 17 reversed.

APPEAL from the Court of Appeal (Scott, Bucknill and Somervell L.JJ.).

This was an appeal from an order of the Court of Appeal, dated July 25, 1946, allowing an appeal by the respondent from an order of the King's Bench Division (Macnaghten J.), dated November 5, 1945, whereby an appeal by the appellant on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and their decision was reversed. The facts are fully stated in the opinion of VISCOUNT SIMON.

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* *Present:* VISCOUNT SIMON, LORD PORTER, LORD UTHWATT, LORD DU PARCQ and LORD OAKSEY.

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Grant K.C. and *Donovan K.C.* for the appellant.

Sir Frank Soskice S.-G., J. H. Stamp and *Reginald Hills* for the respondent.

The arguments sufficiently appear from their Lordships' opinions.

THE HOUSE took time for consideration.

Feb. 27. VISCOUNT SIMON. My Lords, this is an appeal from the Court of Appeal (Scott, Bucknill and Somervell L.JJ.) which reversed the decision of Macnaghten J., in favour of the appellant. The question of law is raised by case stated by the Commissioners for the Special Purposes of the Income Tax Acts and is whether the appellant, who is a married woman living with her husband, is rightly assessed to income tax under case V of sch. D for the year 1942-3 in respect of remittances amounting to 7,082*l.* which she received in London in the previous year from property in America. The balance of her American income for that year, viz., 6,533*l.* was retained in America. It is not disputed that the whole of her American income was assessable as " income arising from possessions out " of the United Kingdom." The question is—who is liable to pay the tax on it, the appellant, or her husband ? The Court of Appeal, in agreement with the Special Commissioners, held that in the circumstances of the case the appellant was rightly assessed for the amount remitted, viz., 7,082*l.*, while her husband Lieut-Colonel Nugent-Head should be assessed for the amount not remitted, viz., 6,533*l.*

It is much to be regretted that the present statute law defining in what cases a married woman is herself liable to income tax, and in what cases the liability to tax on her income falls on her husband instead, is not stated in plain and unambiguous language. Even if the heavy task of re-enacting the whole of our income tax law in less complicated terms is too great to be undertaken at present, it would be well worth while to revise and re-express that part of it which deals with married women. As it is, the words now in operation are largely borrowed from Acts of 1803, 1805 and 1806, at which dates the effect of marriage on the property of the wife was very different from what it is to-day. Income tax came to an end after Waterloo, and from 1816 there was no income tax in this country till 1842. Nevertheless, the relevant provisions of the Act of 1842 are plainly modelled on the repealed sections and now reappear practically unaltered in r. 16 of the All Schedules Rules in the consolidating Act of 1918.

The relevant circumstances, as found by the Commissioners, are as follows: The appellant, who was an American citizen, and her husband, who is an Englishman, were married in 1933 and lived together in London. At all material times she was ordinarily resident in the United Kingdom. Her husband was in business in this country, but in 1939 he joined the army. Until November, 1941, he was stationed at various places in this country, and his wife continued to live in London, but frequently went to stay at hotels near where her husband was from time to time stationed. The husband spent all his periods of leave with his wife. In November, 1941, he went on active service overseas, and up to the hearing by the Special Commissioners (September, 1944) was still abroad, and had not, on account of such service, been able to return to this country at all. His wife continued to reside in London in a flat which she acquired in her own name in July 1940, the husband's personal effects were left in her care, and the flat constituted the marital home which was at all times available to the husband should he be able to return to it. The parties frequently and regularly corresponded, and the marriage had been and remained a very happy one. It was admitted on behalf of the respondent that, as already stated, the appellant was "living "with her husband" within the meaning of proviso 1 to the said r. 16.

The Crown contends (and this contention prevailed in the Court of Appeal) that the appellant, in the relevant year, whilst admittedly "a married woman living with her husband" under proviso 1 of the rule, was at the same time "a married woman "living in the United Kingdom separate from her husband" within the meaning of proviso 2 of the rule. The appellant, on the other hand, argues that such a contention does violence to the structure of the rule and that the two provisoes deal with contrasted situations both of which cannot exist at the same time. In other words, the appellant says that if a married woman is "living with her husband" she cannot at the same time be said to be "living . . . . separate from her husband," and that, as it is admitted that she satisfies the condition in which proviso 1 operates, none of her income can be assessed and charged in her name, and the circumstance that she and her husband were, owing to his war duties, in different places, does not and cannot involve the proposition that she is "living "separate" from him.

There can be little doubt that if the form in which the two provisoes appear is the governing consideration, a distinction between two opposed conditions is indicated. The Crown's argument that proviso 2 should be read as a qualification of proviso 1 is prima facie opposed to the natural construction of two provisoes connected by the word "and" and apparently dealing with contrasted situations. But the Solicitor-General points to the words in proviso 2 "whether the husband be "temporarily absent from her or from the United Kingdom "or otherwise" and urges that temporary absence of the husband is consistent with the fact that the wife was "living with "her husband." The argument then is that temporary absence is a form of separation dealt with in proviso 2 and that it is therefore quite possible and indeed necessary to read proviso 2 as a qualification of proviso 1. If this is not the correct interpretation, why, it is asked, is temporary absence mentioned at all?

A further argument used to support the Crown's view is that if proviso 2 applies only in cases where proviso 1 does not apply, then it is surplusage, since the first words of the rule in themselves make a married woman who is not living with her husband assessable and chargeable to tax if she is entitled to any property or profits to her separate use. This second argument can, I think, be disposed of at once, for the language of proviso 2 is not in terms addressed to property or profits to which a married woman is entitled to her separate use but deals with the special case of allowance or remittance from property out of the United Kingdom. Moreover, the last words of proviso 2, dealing with receipts from the husband, are not under any construction surplusage. This second argument therefore fails.

The first argument, however, raises a difficult point: the considerations on either side are set out in the contrasting judgments of Macnaghten J. and of the Court of Appeal. I have reached the conclusion that the two provisoes deal with contrasted situations and that the second ought not to be read as a qualification of the first. The first deals with the case where there has been no rupture of marital relations and the parties are living together in the ordinary way of man and wife. The fact that one of them is physically away from the other for a time, even for a long time, whether from duty or illness or other cause, is no reason for saying that the wife is not "living "with her husband." The finding of the Commissioners that the appellant in this case was ordinarily resident in the United Kingdom involves this, that her husband was also a resident here in the income tax sense, although he may have been for a time physically abroad. The marital home was here and it was the home of both of them. The Commissioners therefore rightly found, and the Crown rightly admitted, that the appellant was, notwithstanding her husband's absence, "living with her "husband." Proviso 2, in my opinion, deals with the contrasted case where there has been a rupture in normal matrimonial relations. This may arise from a decree of judicial separation, or from the parties executing a deed of separation, or from a more informal agreement between the spouses that they will not live together. In such circumstances proviso 2 applies and the operation of the opening words of the rule do not nullify anything in proviso 1. I do not find so much difficulty in construing the words in proviso 2 specially relied upon by the Crown as appears to have been felt in the Court of Appeal. The case may arise in which a husband and wife, who have not been getting on well together, may agree that they will live separate from one another for a time, say a couple of years, and will then see whether it would not be better to come together again and live in a common home as an ordinary man and wife. I should suppose that such an arrangement is not infrequently brought about by the intervention of parents or other friends as a way of obviating more serious steps. It may be the means of saving the marriage in the long run. As for the words "or otherwise" to which Scott L.J. said he could give no meaning (1), I think they cover a case where the separation is permanent and the husband's absence has no set limit. If the phrase about temporary absence was not included in proviso 2, a married woman whom it was sought to assess and charge under that proviso might argue that the proviso did not apply because her husband would be returning to her after a time, or that, though he was physically absent, he was still in the United Kingdom. The phrase which is supposed to create so much difficulty would at any rate meet that argument. But there is a further point. As proviso 2 stands, the Crown must contend that without any rupture of marital relations the wife can be charged in a case where her husband has never left the United Kingdom at all but is detained at work at some place within it other than the marital home. Inasmuch as the husband would be resident in this country and would be regarded as living with his wife, though physically absent, there seems no reason why proviso 2 should be needed to apply in such a case. The conclusion at which I arrive can therefore be broadly stated as follows. Proviso 1 deals with the case where there has been no matrimonial rupture and the wife is "living with her husband," albeit that her husband for one reason or another is away from her for a considerable period of time. Proviso 2 deals with the contrasted case where there is a rupture in marital relations and the wife is "living in the United Kingdom separate from "her husband." The word, it will be noted, is "living," not "being." This view accords with what was said by Rowlatt J. in *Eadie* v. *Inland Revenue Commissioners* (1). In the Scotch case of *Derry* v. *Inland Revenue Commissioners* (2) Mrs. Derry was held to be rightly assessed in respect of her Canadian income received here when her husband was necessarily away from her for a long period in Cairo. The grounds upon which the three Lords of Session arrived at this conclusion differed. Lord Sands and Lord Ashmore held that proviso 2 applied, and that the wife was de facto living in the United Kingdom separate from her husband within the meaning of that proviso: Lord Blackburn reached his conclusion on the ground that the principal words of the rule applied, and that there was ample evidence to justify a finding that the terms of proviso 1 did not apply. It will be observed, therefore, that none of the judges sought to read proviso 2 as a qualification on proviso 1. In so far as the decision involves the view that prolonged absence in itself proves that the spouses are not living together, I respectfully dissent from it.

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(1) [1947] K. B. 17, 21.

The construction which I put upon this crabbed and involved piece of legislation avoids the necessity of discussing other difficulties which might have to be dealt with if the Crown's main contention were right. If a married woman who is living with her husband can at the same time be a married woman living separate from her husband on the ground that he is physically absent from her, for how long has this absence to persist? It was suggested, I understand, that the absence must be for a whole year, though I see nothing in the words to say so. And which year, the year of assessment or the previous year? These difficulties, however, do not now arise. I move that the appeal be allowed with costs, and that the judgment of Macnaghten J. be restored.

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(1) [1924] 2 K. B. 198, 207.

(2) 1927 S. C. 714.

Lord Porter. My Lords, I have had an opportunity of reading the speech just delivered by my noble and learned friend on the woolsack and find myself so much in agreement with it that I have not thought it necessary to add any observations of my own. My Lords, my noble and learned friend, Lord Oaksey, who is unable to be present, has asked me to say that he has had an opportunity of reading the opinion of the noble Lord on the woolsack and he agrees with it.

Lord Uthwatt. My Lords, the provision contained in r. 16 of the All Schedules Rules, has a long history which is set forth in the judgment given by Scott L.J. in the Court of Appeal. That part of it which is now embodied in the second proviso made its first appearance in the Income Tax Act, 1805, and its present form does not in any material respect differ from its original form. Research inspired by curiosity has failed to reveal the reasons which led to the introduction made in 1805. It may be that the Solicitor-General is right in his conjecture that the new part, when first introduced, was designed as a collecting provision to deal with the case where the husbands were in India or the plantations and their wives were living in Great Britain. Other conjectures may, however, be made. I venture one. The opening part of the provision dealt only with married women who were sole traders or who were entitled to property for their separate use. No reference to separate use is contained in the new part introduced in 1805. Property received by a married woman from her husband would certainly not be property held to her separate use, and property received from abroad by her from other sources might well not be either property held to her separate use or property belonging to her husband by marital right. It may therefore be that this new provision was then intended to catch property which otherwise would escape charge. But the matter is one of historical interest only. Whatever be the reasons which led to the passing in 1805 of the new provision, those reasons cannot be of any relevance on the question of the construction of the provision as it appears in the Income Tax Act, 1918. That Act must be construed as it stands by reference to its contents. Your Lordships are asked by the respondent to hold that as a matter of construction of the rule a married woman living with

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her husband within the meaning of proviso 1 may at the same time be a married woman living separate from her husband within the meaning of proviso 2. The respondent contends that on the facts of the case, Mrs. Nugent-Head fills both descriptions.

Rule 16 one may agree is a curious rule. The married woman who was a sole trader in 1918 stood in no different position as respects her property from any other married woman, and property held to the separate use of a married woman, as that phrase is technically understood, was in 1918 uncommon. The provision does not in terms take any notice of the capacity given to married women to hold property, conferred by the Married Women's Property Acts, and property held by virtue of the capacity so conferred was the common form of married women's property in 1918. Again, married women who live with their husbands are treated as exceptional persons—relegated for treatment to a proviso. Lastly a married woman living separate from her husband who receives remittances from abroad—not I imagine a common case—is treated as one whose position demands detailed treatment. In respect of remittances from her husband or his property, she is to be taxed as his agent, and in respect of remittances from other property as a feme sole. Neither the selection of remittances from abroad for separate treatment, nor the distinction between the two cases marks any intelligible taxing principle. Astonishing conclusions may indeed be expected to emerge from a rule so conceived and framed, but I am unable to come to the conclusion that it is rounded off in the way the respondent suggests.

Upon two matters the appellant and respondent are agreed. It is common ground that r. 16 is a collecting section and not a charging section and the question at issue is therefore not whether certain profits are to be charged to income tax but whether it is the husband or the wife who is to be assessed in respect of those profits. It is again common ground that a married woman is living with her husband within the meaning of proviso 1 to r. 16 when they are sharing their matrimonial life, although they may for the time being be geographically separate.

There agreement stops. The case for the appellant is that proviso 2 has no application to a married woman who is living with her husband. The case for the respondent is that such a married woman may also be a married woman living in the United Kingdom separate from her husband within the meaning of proviso 2 and that where such a married woman emerges for consideration, that proviso operates as a qualification on proviso 1 with the result that in respect of allowances or remittances received by her from property out of the United Kingdom, she and not her husband is to be charged and assessed.

The argument for the respondent may be put concisely. Due weight must be given to the words "whether the husband "be temporarily absent from her or the United Kingdom or "otherwise" and the word "temporarily" is to be emphasized. If that be done it is apparent that the proviso envisages a case where the wife is living separate from the husband by reason only of a temporary absence from her of the husband—a state of affairs which is consistent with the wife living with her husband in the sense of proviso 1. The matter does not rest there. It is apparent (and the respondent is clearly right in this) that unless there can be a married woman who is living with her husband within the meaning of proviso 1 and living separate from him within the meaning of proviso 2, the first limb of proviso 2 does nothing. It merely reiterates as regards all women (not being women living with their husbands within the meaning of proviso 1) a liability to tax which has already attached to them under the opening part of the rule. Some content must be given to the first limb of proviso 2 and that can only be done by accepting the respondent's contention as to the meaning of the phrase "living separate," and reading proviso 2 as a proviso either to proviso 1 or to all the preceding parts of the rule. Logic must reign.

My Lords, I am not prepared, in light of the peculiarities of the rule to which I have adverted, to attach much weight to the argument of the respondent based on the lack of content of the first limb of proviso 2 if his construction be not accepted. If that construction be not required by other considerations, the first limb of the proviso may be taken as directed to pointing the contrast between the foreign remittances to which a married woman is to be assessed as a feme sole and the foreign remittances to which she is to be assessed as agent of her husband.

Taking the lay-out of the rule, the two provisoes are governed by the one set of words "Provided that" and they are connected by the word "and." The natural reading is that each proviso is independent of the other and that each modifies only the substantive rule. That expectation is borne out by the circumstance that proviso 1 deals with the case of a married woman living with her husband and proviso 2 with a married woman living separate from her husband. In the normal use of language to say of a married woman that she lives separate from the husband is to contradict the proposition that she is living with her husband. The weight of the argument for the respondent lies in the appearance in proviso 2 of the phrase "whether the husband be temporarily absent from her or the "United Kingdom or otherwise." Absence in some rational sense there must be, but, subject to this, that phrase includes within its embrace any form of marital absence, however long or short in point of time and however great or small the geographical distance between the spouses. Resort to the words "living separate" is not legitimate in order to modify the meaning of the phrase. But in construing the proviso, the sentence must be read as a whole. The leading idea, to my mind, is that the wife is to be living separate from her husband, and there is added the phrase in question dealing with one and only one of the matters involved in "living separate"—physical absence. The outstanding fact is that the phrase is put in as a parenthesis. Surely the effect of the sentence is that, given that the married woman is living in the United Kingdom separate from her husband, nothing else matters. Inquiry into the affairs of the matrimonial life is to be confined to the one fact, "Is the wife living in the United Kingdom separate from "her husband?" Further delving into her matrimonial life is to be irrelevant. Taking that view of the effect of the parenthetical words, I am of the opinion that the two provisoes deal with separate cases and that it is not right to treat proviso 2 as in any way qualifying proviso 1.

I find it unnecessary to deal with many of the matters covered in argument. I would only say that the difficulties in the way of the respondent are increased by the circumstance that, until 1927, the assessment on allowances and remittances from abroad was based on an average of the receipts for the previous three years. It is not necessary to express an opinion on the point whether the inquiry on the question whether the wife is living separate is to be addressed to the date of receipt of remittances or to the year of assessment. It is not reassuring that on this point both these views—the one by way of alternative to the other—were put forward for your Lordships' consideration by the respondent. The Act apparently in this regard does not bear a clear meaning to those whose duty it is to administer it consistently.

It is not for lack of respect for the opinion of those who in this and other cases have taken a contrary view as to the effect of the rule that I do not deal with the reasons that have been given by them. I may, I trust, be forgiven for saying that it does not diminish my confidence in my own view to recall that some three not entirely consistent reasons have been given in support of the opposite conclusion.

On the facts of the case Mrs. Nugent-Head was a married woman living with her husband at all possibly relevant dates. I would, therefore, allow the appeal.

LORD DU PARCQ. My Lords, the appellant and the respondent are agreed that the phrase "living with her husband," which qualifies the term "married woman" in proviso 1 to r. 16, is apt to describe a wife living in amity with her husband, although she may be compelled by circumstances temporarily, and it may be for a long time, to live apart from him. If there had been any argument to the contrary effect the problem before your Lordships might have presented a different aspect, but, even so, I see no reason to think that your Lordships' scrutiny of this perplexing rule would, in the end, have produced a different result. I am content to assume that both the parties, in so far as they are agreed, are right. If that be granted, it seems to me to be reasonably plain that, unless there is something in the context which points unmistakably to a contrary conclusion, the words "living . . . . separate "from her husband" in proviso 2 must be read as expressing the antithesis of "living with her husband." The Court of Appeal found a reason for rejecting this construction in the words "whether the husband be temporarily absent from her "or from the United Kingdom or otherwise" and in the reference to "any allowance or remittance" which the wife may receive "from or through" her husband, "or from his "property, or on his credit." I do not myself feel that these words are any less in harmony with the construction adopted by Macnaghten J., than with that which commended itself to the Court of Appeal. Few judges who have had to deal with cases in which marital relations have come under review can have failed to observe that separations which are caused by a rift in the marriage are by no means inevitably permanent. Not every "desertion" (for instance) endures for the full three years which make it a sufficiently grave matrimonial offence to be ground for a divorce. As for allowances and remittances, I should have thought that nothing was more common than for a husband who has agreed with his wife that she should live separate and apart from him to perform his legal obligation and maintain her. He can only maintain her by somehow supplying her with money, which will certainly come "from "or through him," and may in many instances be properly described as coming "from his property" or "on his credit." I agree with those of your Lordships who have preceded me that Macnaghten J. came to the right conclusion, and I would allow this appeal.

Appeal allowed.

Solicitors for appellant: *Gordon, Dadds & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS]

H. L. (E.)*
1948
Feb. 17, 19; *Mar.* 19.

PEGLER . . . . APPELLANT;

AND

RAILWAY EXECUTIVE . . . RESPONDENTS.

Railway — Amalgamation — Employee transferred — Conditions of service—Position worsened—Claim for compensation—Arbitration—Limitation—Railways Act, 1921 (11 & 12 *Geo.* 5, *c.* 55), *sch. III, paras.* 3, 4—*Limitation Act,* 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 1; *s.* 27, *sub-ss.* 1, 6.

By sch. III to the Railways Act, 1921, dealing with the amalgamation of railway companies: "(1.) Every existing officer "and servant shall, as from the date of amalgamation or absorption, "become an officer or servant of the amalgamated company: ". . . . (3.) No existing officer or servant so transferred shall, "without his consent be by reason of such transfer in any worse "position in respect to the conditions of his service as a whole "(including tenure of office, remuneration, gratuities, pension, "superannuation, sick fund or any benefits or allowances whether "obtaining legally or by customary practice of the constituent "or subsidiary company) as compared with the conditions of service "formerly obtaining with respect to him: (4.) If any question

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* *Present:* LORD THANKERTON, LORD PORTER, LORD UTHWATT, LORD DU PARCQ and LORD OAKSEY.

"arises as to whether the provisions of the last foregoing paragraph "have been complied with, the question shall be referred to a "standing arbitrator or board of arbitrators appointed by the "Lord Chancellor, and, if the arbitrator or board consider that "those provisions have not been complied with, and that the "officer or servant has thereby suffered loss or injury, they shall "award him such sum to be paid by the amalgamated company "as they think sufficient to compensate him for such loss or "injury."

By the Limitation Act, 1939, s. 2, sub-s. 1: "The following "actions shall not be brought after the expiration of six years from "the date on which the cause of action accrued that is to say: ". . . . (*d*) actions to recover any sum recoverable by virtue of "any enactment, other than a penalty or forfeiture or sum by way "of penalty or forfeiture . . . ." By s. 27 of the Act: "(1.) This Act and any other enactment relating to the limitation "of actions shall apply to arbitrations as they apply to actions "in the High Court . . . . (6.) This section shall apply to an "arbitration under an Act of Parliament as well as to an arbitration "pursuant to an arbitration agreement . . . ."

For purposes of promotion, the seniority of a fireman employed by a railway company, whose system was absorbed into that of a larger group under the provisions of an amalgamation scheme made under the Railways Act, 1921, was, in consequence of a decision given in 1924 by the sectional railway council set up for the new system, caculated as from 1916, whereas before the transfer it was calculated as from 1913. In 1933 a man senior to him under the current practice but junior to him under the former practice was appointed a driver, whereas he himself was not so appointed till 1936, reaching the maximum rate of pay in 1937, and thereafter receiving the same wages as if he had been appointed in 1933. In 1942 he made a claim for compensation under sch. III to the Act of 1921.

Held that the claim was barred by s. 2, sub-s. 1 of the Limitation Act, 1939. When once the conditions of service under the amalgamation were settled in 1924 they could be compared with the pre-amalgamation conditions; the cause of arbitration arose then and was not postponed till losses were exactly quantified by actual happenings.

In the application of the Limitation Act, 1939, to a statutory arbitration, the cause of arbitration is to be treated in the same way as a cause of action would be treated if the proceeding were in a court of law. The provisions of the Act are not inapplicable to such arbitrations in cases where the time limit has run out before the Act was passed.

Decision of the Court of Appeal (63 T.L.R. 178) affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R. and Bucknill J.).

Under the Railways Act, 1921, provision was made for the amalgamation of the Great Western Railway Co. and the Taff

Vale Railway Co. On July 1, 1923, the Great Western Railway Co. was constituted the amalgamated company by the Railways (Western Group) Amalgamation Scheme, 1923 (St. R. & O. 1923, No. 817). On March 2, 1942, the appellant, an employee of the Taff Vale Railway Co. transferred to the amalgamated company, made a claim for compensation, based on paras. 3 and 4 of sch. III to the Act, for financial loss occasioned by the alteration in his conditions of employment and that claim was duly referred to the standing arbitrator.

The material facts, found by the standing arbitrator, were summarized by LORD UTHWATT as follows: On October 24, 1913, the appellant entered the service of the Taff Vale Railway Co. and was employed in that company's locomotive running department as a labourer. On April 14, 1919, the Taff Vale Railway Co. appointed the appellant to the grade of fireman. From July 28, 1920 to July 1, 1923, when the Taff Vale Railway Co. was amalgamated with the Great Western Railway Co., it was the practice of the Taff Vale Railway Co. to rank firemen for promotion to drivers in the order of the dates when they respectively entered the company's locomotive running department. In the appellant's case that date was October 24, 1913. On the date of the amalgamation, the appellant was transferred to the service of the Great Western Railway Co. At that date it was the practice of that company to rank firemen for promotion to drivers in the order of the dates when they became cleaners, or, if they had never become cleaners, of the dates when they had become firemen. The appellant had never been employed as a cleaner, and according to this practice his seniority for promotion to driver was calculated from April 14, 1919, when he had become a fireman. At this stage the appellant's loss of seniority was some five and a half years. On May 14, 1924, the Great Western Railway Co. giving effect to a decision of the Sectional Railway Council (No. 2) set up for the company's system under the Railways Act, 1921, altered their practice regulating the promotion of firemen to drivers. Under the altered practice, a former employee of the Taff Vale Railway Co., who had been appointed fireman before August 18, 1919, was deemed for purposes of seniority to have been made a fireman three years after he had entered the locomotive running department of the Taff Vale Railway Co. As the appellant had entered the locomotive running department on October 24, 1913, his date for the purpose of seniority thus became October 24, 1916. His loss of seniority was thus reduced from five and a half years to three years. On April 3, 1933, the Great Western Railway Co. appointed as driver a man who had formerly been in the employment of the Taff Vale Railway Co. This man was junior to the appellant under the Taff Vale Railway Co.'s practice, but senior to the appellant under the practice of the Great Western Railway Co. On March 9, 1936, the Great Western Railway Co. appointed the appellant driver. On May 8, 1937, the appellant reached the maximum rate of pay applicable to drivers, and thereafter received the same wages as if he had been appointed driver on April 3, 1933. On March 2, 1942, the apellant made a claim for compensation under sch. III. On May 7, 1942, the Great Western Railway Co. rejected this claim. It was common ground between the parties before the standing arbitrator that the conditions of the appellant's service were not, save as regarded loss of seniority, altered by his transfer from the service of the Taff Vale Railway Co. to the service of the Great Western Railway Co.

Upon these facts the standing arbitrator held that the date of the commencement of the arbitration was March 2, 1942, and that the appellant's claim was barred by the Limitation Act, 1939. This question of law was referred by the standing arbitrator to the High Court. Atkinson J. was of the opinion that the arbitrator was right in his conclusion of law and the Court of Appeal affirmed his decision. The appellant appealed to the House of Lords. As a result of the Transport Act, 1947, and the scheme of delegation of functions made by the British Transport Commission, the Railway Executive replaced the Great Western Railway Co. as respondents in the appeal.

Beney K.C. and *Montagu Nicholas* for the appellant. The two questions are: (*a*) On the true construction of the Limitation Act, 1939, does the Act apply to claims for compensation under sch. III to the Railways Act, 1921? (*b*) If so, on the facts found and on the true construction of the Act, when did the time begin to run? In interpreting s. 27 of the Act of 1939 it is to be remembered that s. 27, sub-s. 2, replaces s. 16, sub-s. 2, of the Arbitration Act, 1934, which was designed to resolve the difficulties expressed in *Cayzer, Irvine & Co., Ld.* v. *Board of Trade* (1) affirmed in *Board of Trade* v. *Cayzer, Irvine & Co. Ld.* (2). The Act of 1939 does not apply to claims for compensation under sch. III to the Act of 1921. The words "cause of arbitration" are nowhere used in relation to

(1) [1927] 1 K. B. 269, 282, 290. (2) [1927] A. C. 610.

statutory arbitrations and there was no "cause of action" until the date of the award or, at any rate, until March 2, 1942, when the appellant raised the question, as distinct from the date when he was entitled to raise it, for para. 3 of sch. III only lays down the principle on which the arbitrator is to act, if and when a question is referred to him under para. 4, in which is found the right to submit a question to him. By s. 27, sub-s. 1, of the Act of 1939, s. 2, sub-s. 1, is left untouched and the terms of s. 2, sub-s. 1 (*d*) support the appellant's contention. To bring para. 4 of sch. III into play it must at least be shown that actual loss or injury was suffered. The legal right which may exist and which would ordinarily be dealt with by the courts must then be determined by arbitration; if the crucial date be not that of the raising of the question or of the award, then the earliest date when the cause of arbitration arose was April 3, 1933, when the appellant's actual loss became an established fact, and the appellant continued to suffer loss till May 8, 1937. [They referred to *Hulland* v. *William Sanders & Son* (1); *Parker* v. *Great Western Ry. Co.* (2); *Layen* v. *London Passenger Transport Board* (3); the Railways Act, 1921, s. 3, sub-s. 1 (*c*) and (*f*), and the London Passenger Transport Act, 1933, s. 73, sub-s. 3.]

W. H. Cartwright Sharp K.C. and *MacKenna* for the respondents, were not called on to argue.

THE HOUSE took time for consideration.

Mar. 19. LORD THANKERTON. My Lords, I have had the advantage of considering the opinion about to be delivered by my noble and learned friend, Lord Uthwatt, and I desire to express my concurrence both in his reasoning and in the conclusion at which he arrives.

LORD PORTER: My Lords, I have had the same advantage and I also concur.

LORD UTHWATT. My Lords, the question at issue in this appeal is whether a claim for compensation preferred by the appellant against the Great Western Railway Co. under the provisions of the Railways (Western Group) Amalgamation

(1) [1945] K. B. 78, 83.
(2) (1944) 170 L. T. 284, 285.
(3) [1944] 1 All E. R. 432.

Scheme, 1923, made under the Railways Act, 1921, is barred by the Limitation Act, 1939. As the result of the Transport Act, 1947, the Great Western Railway Co. is not now interested in the matter, and by virtue of that Act and the Scheme of Delegation of Functions made by the British Transport Commission, the Railway Executive has replaced the railway company as respondent in this appeal. That change of interest and parties has not in any respect altered the rights of the appellant.

It is convenient to recall the relevant provisions of the Railways Act, 1921. Section 1 provided that the railway system of Great Britain should be formed into groups and that the principal railway companies in each group should be amalgamated and other companies absorbed. Section 3, sub-s. 1 (*b*) provided that an amalgamation scheme should incorporate the provisions contained in sch. III to the Act. Except in the case of the western group, to which the Great Western Railway Co. and the Taff Vale Railway Co. belonged, the amalgamation schemes were to provide for the incorporation of a new company which was to be the amalgamated company. In the case of the western group, the amalgamation scheme was to provide that the Great Western Railway Co. should be the amalgamated company. By s. 7, sub-s. 3, it was provided that the schemes should be binding on all persons and have effect as if enacted by the Act. The only provisions of sch. III which are relevant to this case are paras. 1, 3 and 4.

The Great Western Railway Co. was constituted the amalgamated company of the western group on July 1, 1923, and the scheme of amalgamation duly incorporated the provisions of sch. III to this Act. The appellant, who was a locomotive driver employed by the company, made a claim for compensation based upon paras. 3 and 4 of sch. III and that claim was duly referred to the standing arbitrator.

Two matters have in light of the arguments of the appellant to be dealt with—first, the application of the Limitation Act, 1939, to statutory arbitrations and, second, the construction of paras. 3 and 4 of sch. III.

The Limitation Act, 1939, is an amending and consolidating statute. It made an important change as to the effect of the lapse of time in relation to arbitration proceedings. The Arbitration Act, 1934, had enacted that Statutes of Limitation should apply to arbitrations as they apply to proceedings in the High Court, but that provision did not apply to statutory arbitrations. In the Act of 1939 statutory arbitrations are placed on the same footing as other arbitrations, with the result that the provisions as to limitation are applicable to both. (See s. 27.) The Act came into force on July 1, 1940.

The questions which arise on the Limitation Act itself may be shortly disposed of. Before Atkinson J. and the Court of Appeal it was argued that the provisions of this Act subjecting statutory arbitrations to the rules as to limitation did not apply when the time limit had run out before the Act was passed. That point was not taken before your Lordships. There is indeed nothing in it.

The matter argued was that in the application of the Act to a statutory arbitration the phrase, " the cause of arbitration "—the matter corresponding to " the cause of action " in litigation —is nowhere to be found. This is true, but it appears to me, as it appeared to Atkinson J. that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued. With the Court of Appeal I regard the reasoning of Atkinson J. on this matter as unanswerable. I do not propose to repeat that reasoning, but only his conclusion, which I accept to the full. In Atkinson J.'s view—I quote him (1)—" the proper " interpretation of s. 27 is to apply the Limitation Act " treating a cause of arbitration in the same way as a cause of " action would be treated if the proceeding were in a court of " law."

On the footing that the Limitation Act, 1939, so applies, it is common ground that the period of limitation is six years from the date when " the cause of arbitration " arose. (See s. 2 of the Limitation Act, 1929.) That date depends upon the fair construction of paras. 3 and 4 of sch. III.

Upon this the appellant contended, first, that the cause of arbitration arose on the date when the " question " was raised by the appellant—as distinguished from the date when the appellant was entitled to raise the question. Secondly, in the alternative, the appellant contended that the earliest date was April 3, 1933, when the loss resulting from postponement of seniority became an established fact, and that he continued to suffer loss until May 8, 1937. Success in the first contention would have the consequence that his rights were not barred at all by the Limitation Act, 1939. Success in the second contention would have the consequence that recovery of the loss he sustained between March 2, 1936 and May 8, 1937, was not barred by that Act.

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(1) (1946) 62 T. L. R. 474, 477.

The first contention was based upon the theory that para. 3 of itself did nothing except establish a principle on which an arbitrator was to act if and when a question was referred to him under para. 4. The substantive right was, according to this contention, to be found embedded in para. 4 which gives a right to submit a question to the arbitrator. I am unable to accept this construction of these paragraphs. The terms of para. 3 when incorporated in an amalgamation scheme have statutory effect and in my view created rights in the existing officers and servants. If those rights were invaded, the officers and servants were entitled to a remedy to be obtained in arbitration proceedings. The substantive provision is in para. 3 and the remedial provision is in para. 4.

The second contention demands a closer consideration of the language of para. 3. The keynote to para. 3 lies, in my opinion, in the words "by reason of such transfer." The matter provided is that no existing officer or servant is by reason of the transfer to be in any worse position as respects the conditions of his service. His post-amalgamation conditions resulting from the transfer are to be compared with his pre-amalgamation conditions, both sets of conditions being viewed as a whole.

The relevant conditions of his old service are those obtaining at the date of transfer and are therefore then known. The conditions of his new service as a whole resulting from the transfer may well not be ascertained at the date of the transfer. Teething troubles may be expected even where, as here, the amalgamated company is an existing company. But, when once the amalgamated company has settled the conditions of service under it, the opportunity for the comparison envisaged by the paragraph arises. The effect of the transfer has been ascertained and each transferred officer and servant then knows where he stands by reason of the transfer. Subsequent variations of conditions are irrelevant under the terms of para. 3. If attention is paid to them the go-by is given to the words "by reason of the transfer" and the giving of such attention is therefore repelled by the wording of the provision.

This conclusion does not raise any insuperable difficulty and

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the obstacles in the way of fixing the exact date at which a comparison is to be made are easily exaggerated. The date when the conditions of service in the new company of any transferred officer or servant had been considered and settled is a matter to be determined by evidence.

In the present case it is, I think, a fair inference from the facts stated by the arbitrator that the change of practice in seniority made on May 14, 1924, was a change by reason of the transfer and there is nothing to suggest that a later date for comparison should as respects the appellant be adopted. The date was obviously some comparatively early date in the history of the company and the exact date is obviously not here in issue. But consistently with what I have said and giving due weight to the fact that the Great Western Railway Co. was itself the amalgamated company, I am unable to agree with the Court of Appeal that the date of transfer of the amalgamated company—July 1, 1923—is the critical date. I prefer the view expressed by Atkinson J., May 14, 1924.

On this footing the cause of arbitration arose on May 14, 1924, unless there is anything in the provisions of para. 4 which postpones the date until losses are exactly quantified by actual happenings. The appellant urged that there was. For the statement of his point and the answer to it, I cannot do better than adopt the language of Atkinson J. It is as follows (1): "There is also the point that there is no cause of claim until "the claimant has sustained a loss or injury, or until he can "prove that he is out of pocket and has actually lost money. "Again I cannot accept that point of view because the cause "of action or arbitration is something which arises out of a "comparison of two sets of conditions: Is the second set of "conditions less favourable than the first? If it is less "favourable, then the cause arises, and irrespective of whether "as a matter of fact it has as yet affected the man's pocket. "The question arises then, and it is then that the man has got "to make up his mind: 'Do I, or do I not consent?' If he "thinks that the conditions are less favourable, his right, "and his only right, is to litigate or claim an arbitration to "have his position not made worse; and, if it is made worse, "it is for the arbitrator to say what sum of money will com- "pensate the claimant for the worsened position. Each man "has a right to have his own position considered. The "arbitrator may very often have a very difficult task, but he

(1) 62 T. L. R. 474, 477.

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"has to do the best he can. I think that that is what the "scheme means, and that a man cannot wait until, it may be, "years later." It follows that the cause of arbitration accrued more than six years before the commencement of the arbitration and that the Limitation Act, 1939, is a bar to the claim. I would dismiss the appeal.

My Lords, my noble and learned friend, Lord Oaksey, who is unable to be present to-day, asks me to say that he agrees that the appeal should be dismissed for the reasons given in my opinion, but that he does not think it is necessary to decide whether July 1, 1923, or May 14, 1924, is the critical date.

LORD DU PARCQ. My Lords, I entirely agree with the opinion which has just been delivered by my noble and learned friend, Lord Uthwatt, and I have nothing to add to it.

Appeal dismissed.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondents: *M. H. B. Gilmour.*

[PRIVY COUNCIL.]

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Mar. 3.

PATTERSON . . . . . . APPELLANT;

AND

DISTRICT COMMISSIONER OF ACCRA AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

West Africa—Proclaimed district—Cost of additional police—Assessment — Ministerial act — Execution — Attachment — Prohibition — Peace Preservation Ordinance (Laws of the Gold Coast, 1936 *Revision, c.* 40), *s.* 9.

By s. 9 of the Peace Preservation Ordinance (Laws of the Gold Coast, 1936 Revision, c. 40): "Where additional constabulary or "police have been sent up to or stationed in a proclaimed district "the Governor in Council may order that the inhabitants of such

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* *Present:* LORD SIMONDS, LORD MORTON OF HENRYTON and SIR MADHAVAN NAIR.

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" proclaimed district be charged with the cost of such additional " constabulary or police.

" A District Commissioner within whose district any portion of " a proclaimed district is shall, after inquiry, if necessary, assess " the proportion in which such cost is to be paid by the said " inhabitants according to his judgment of their respective means.

" All moneys payable under this section may be levied under the " law for the time being in force for the levying of moneys ordered " by a Court to be paid."

The appellant, an inhabitant of a " proclaimed district " in respect of which an order for the cost of additional police had been made, failed to pay two sums assessed on him by the District Commissioner, and writs of attachment were issued by the District Magistrate for the levying of the sums out of his property. A motion by the appellant for an order calling on the District Magistrate and the District Commissioner, the respondents, to show cause why an order for a writ of prohibition should not issue to prohibit them from attaching his property was dismissed.

Held, that there was nothing irregular or unlawful in the proceedings complained of by the appellant and the application for the writ of prohibition was rightly dismissed.

Section 9 of the Ordinance contemplates a simple and ministerial proceeding on the part of the District Commissioner. He has to form an honest opinion as to how the sum prescribed ought fairly to be borne by the inhabitants, acting on the principle that the greater a person's means, the greater the sum which he should be called on to pay. The wording of the section, and in particular the phrases " after inquiry, if necessary " and " according to his " judgment of their respective means " are quite inconsistent with the view that the District Commissioner is to be bound to hold anything in the nature of a judicial inquiry, and there is nothing in the section which compels him to give each inhabitant, on whom he proposes to make an assessment, an opportunity of being heard before the assessment is made.

Further, there is no ground for the suggestion that the appellant should have been given an opportunity of showing cause against the issue of the writs of attachment. The assessments having been made, the respondents were entitled to proceed exactly as they would have proceeded had orders of a competent court been obtained for payment by the appellant of the two sums, and in such a case the appellant would not have been entitled to be heard before the issue of writs of attachment. There was nothing irregular in the proceedings up to and including the issue of the writs of attachment and the provisions of s. 9 had been carried out.

Since, as held above, the section did not contemplate any judicial proceeding, a decision against the appellant, who had admittedly been deprived of part of his property without having had an opportunity of being heard by either of the respondents, did not infringe the principles stated in *Bonaker* v. *Evans* (1850) 16 Q. B. 162, 171.

Judgment of the West African Court of Appeal affirmed.

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Appeal (No. 2 of 1945) from a judgment of the West African Court of Appeal (March 7, 1944) which had dismissed, with costs, an appeal from a judgment of the Supreme Court of the Gold Coast (June 22, 1943) rejecting a motion by the appellant for writs of prohibition directed to the District Commissioner, the District Magistrate, and the Sheriff, all of Accra, in connexion with proceedings taken to levy execution under an assessment. At the opening of the present appeal, counsel for the appellant intimated that he was not pursuing the claim for a writ of prohibition against the Sheriff.

The following provisions of the Peace Preservation Ordinance, and the statement of the facts, are taken from the judgment of the Judicial Committee.

" 2. In this Ordinance, unless the context otherwise " requires—

* * * * *

" ' Proclaimed district ' means and includes any specified " part of the Gold Coast as to which any proclamation " under section 3 has been made so long as such " proclamation is in force.

" 3. Whenever it shall appear to be necessary for the " preservation of the public peace in any part of the Gold " Coast, the Governor may declare by proclamation that it is " unlawful to have or carry arms or ammunition within any " specified part of the Gold Coast after the date specified " in such proclamation and subject to any exceptions in the " said proclamation provided for.

* * * * *

" 9. Where additional constabulary or police have been " sent up to or stationed in a proclamed district the Governor " in Council may order that the inhabitants of such " proclaimed district be charged with the cost of such " additional constabulary or police.

" A District Commissioner within whose district any " portion of a proclaimed district is shall, after inquiry, if " necessary, assess the proportion in which such cost is to be " paid by the said inhabitants according to his judgment of " their respective means.

" All moneys payable under this section may be levied " under the law for the time being in force for the levying of " moneys ordered by a Court to be paid."

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On September 27, 1942, the area within a radius of one mile from the Labadi Market in the Accra District became a "proclaimed district" by reason of a proclamation made on that date by the Governor of the Gold Coast under s. 3 of the Ordinance. On November 30, 1942, the Governor made the Peace Preservation (Labadi) Order, 1942, under s. 9 of the Ordinance. By that order the inhabitants of the proclaimed district were ordered to be charged with 321*l.* 16*s.* 11*d.*, being the cost of additional police who had been sent up to and stationed in that district. On January 14, 1943, the District Commissioner at Accra gave notice of his assessment of the proportion which each person should pay, and required payment to be made within seven days. In a schedule was set out a list of houses in the proclaimed district with the name of the owner or occupier of each house and the amount to be paid by such owner or occupier. The appellant was assessed in respect of two houses, and was required to pay 3*l.* 18*s.* 9*d.* in respect of one and 1*l.* 10*s.* 6*d.* in respect of the other. The notice was posted at the District Commissioner's office in Accra, and copies thereof were posted at conspicuous places at Labadi, including the Chief's house. The appellant and ten other assessed persons failed to comply with the notice requiring payment. On May 10, 1943, on the application of the District Commissioner, the District Magistrate, Accra, issued two writs of attachment to the Sheriff, Accra, for the levying of the sums of 3*l.* 18*s.* 9*d.* and 1*l.* 10*s.* 6*d.* out of the property of the appellant. Other writs were issued in the cases of the other ten persons who had failed to pay, but it was agreed that the appellant's case should be treated as a test case.

On May 18, 1943, the appellant gave notice of motion in the Supreme Court for an order calling on the respondents and the Sheriff, Accra, to show cause why an order for writ of prohibition should not issue to prohibit them from attaching the appellant's property. In an affidavit in support of the motion the appellant alleged that he had not attended, or been invited to attend, or given the opportunity of attending, any inquiry; that there had been no valid and lawful assessment; that he had not been served with any order or decree for payment; and that the execution proceedings were illegal. The appellant did not allege that he had not seen the notice. The District Commissioner swore an affidavit in answer on June 3, 1943, setting out the steps which had been taken by him. On June 22, 1943, Lane J. dismissed the motion, with costs. The appellant appealed to the West African Court of Appeal (Kingdon C.J. Nigeria, Paul, C.J. Sierra Leone, and Doorly Ag. C.J. Gold Coast), and the appeal was dismissed with costs.

1948. Feb. 4, 5. *Rewcastle K.C.* and *L. M. Minty* for the appellant. The fundamental question is as to the meaning to be given to s. 9 of the Peace Preservation Ordinance. It would appear that the way in which in fact the District Commissioner made his assessment was to take the local rating list and proceed to levy the entire sum on the people appearing in the list. That is not in any way a compliance with the section. It is essential under s. 9 that the sum to be paid should be charged on *all* the inhabitants of the proclaimed area. For the meaning of "inhabitants" see Burrows' Words and Phrases, vol. 3, p. 108. It is not disputed that the appellant was at the time an inhabitant, but when an allocation has to be made among the inhabitants obviously if some are omitted who ought to have been included a heavier burden is automatically placed on the others. This omission is sufficient in law to invalidate the assessment: *Rex* v. *Overseers of Maddern* (1). This is all on the assumption that this is a judicial and not a ministerial act: it is submitted that the District Commissioner in making the assessment was plainly acting in a judicial capacity: *Rex* v. *Inhabitants of Darlington* (2). If the District Commissioner in fact did what is suggested—made use of the rating list—he obviously did not act "according to his judgment." The next submission on s. 9 is that the District Commissioner must hold an inquiry. In this case there was no inquiry at all; the appellant was given no notice and no opportunity of going to the court on any aspect of the matter. However difficult the task may be, an inquiry must be held. The courts below took the view that it is unnecessary to hold an inquiry, and that under this section the District Commissioner was not performing a judicial or quasi-judicial duty, but a ministerial function. With regard to the last paragraph of s. 9, it would be against the fundamental principles of justice that a man should have execution levied on his goods without having been afforded any opportunity of being heard: *Tracy* v. *Talbot* (3); *Rex* v. *North. Ex parte Oakey* (4); *Rex* v. *Benn and Church* (5);

(1) (1787) 1 Term Rep. 625.
(2) (1795) 6 Term Rep. 468.
(3) (1704) 2 Salk. 532.
(4) [1927] 1 K. B. 491.
(5) (1795) 6 Term Rep. 198.

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Harper v. *Carr* (1); *Rex* v. *Martyr* (2); *Rex* v. *Hughes* (3) and *Reg.* v. *Totnes Union* (4).

It was said by the Supreme Court below that "the enactment which is brought into play by the latter part of s. 9 of "c. 40 is Or. 43, r. 5, of c. 4, which says 'if the decree be for "'money, it shall be enforced by the attachment and sale of the "'property of the party against whom the decree is made'." "Decree" there is a decision in a civil suit, and if the District Commissioner is to be regarded as an administrative officer his decision could not be regarded as a decree. Further, these are quasi-criminal proceedings, and Or. 43, r. 5, has no application at all; they should have proceeded, if at all, under s. 305 of the Criminal Procedure Code, and if they had, certain conditions should have been satisfied which were not. If it was a criminal matter clearly there must have been a hearing, otherwise the appellant would have been punished without an opportunity of being heard. Lastly, it is submitted that the view of the Court of Appeal below that a further "reason for refusing a writ "directed to the District Commissioner" was that he was functus officio, was wrong: *Estate and Trust Agencies* (1927), *Ld.* v. *Singapore Improvement Trust* (5).

Gahan for the respondents. The District Commissioner was doing only ministerial acts in respect of which the writ will not issue. Liability is imposed by the order of the Governor fixing the charge, and then the District Commissioner has to make the assessments. That is not any judicial or quasi-judicial proceeding, but only a ministerial duty. The words "after inquiry, if necessary," do not mean that there shall be anything in the nature of a public inquiry; the District Commissioner can seek information and act on it; it is all ministerial. He has to endeavour to apportion according to his own knowledge; he is the judge. "Respective means" would mean their ability to bear the burden. With regard to the last clause of s. 9, the legislature was directing its mind to what is to happen after the District Commissioner has ministerially apportioned the burden among the inhabitants, and is saying that once that act is performed the collection is to proceed as if there was a regular judgment of a court of law. There can be no question of any further hearing of the parties at that stage. It was argued for the appellant that this ought to have

(1) (1797) 7 Term Rep. 270.
(2) (1810) 13 East 55.
(3) (1835) 3 Ad. & E. 425.
(4) (1845) 7 Q. B. 690.
(5) [1937] A. C. 898.

been under s. 305 of the Criminal Procedure Code. It is contested that there is anything criminal in this at all, but if there were, there would simply be two methods of levying the money, that is all. Everything that was done by the District Commissioner and the District Court was properly exercised in this case. Once there is what is equivalent to an order of a court there is machinery for execution exactly as if there were the order of the court, and the only duty on any person is to apply the machinery. The proceedings for the writs of attachment brought into operation judicial actions which were regularly and judicially performed. The general proposition of English law that in judicial proceedings a person cannot be affected in his absence and without an opportunity of being heard is not challenged, but it is essential in that regard that there should be judicial proceedings: *Bonaker* v. *Evans* (1), and the cases there mentioned. In all these cases in the last resort it must be seen whether the legislature intended to impose judicial duties or merely ministerial: *Harper* v. *Carr* (2). The District Magistrate had full power to issue the writs of attachment, and the decision of the Court of Appeal below was right. [Reference was also made to *Estate and Trust Agencies* (1927), *Ld.* v. *Singapore Improvement Trust* (3).]

Rewcastle K.C. replied. It would be very surprising if there were to be found in an enactment power given to a District Commissioner to select particular people to bear this burden—a burden which, on any view, is one for the benefit of every inhabitant—without any regard to any question of justice and equity between one individual and another. If it had been intended to make a provision of that kind one would have expected such language as " in his discretion," or " the inhabitants or some of them " ; here the language is inapt for that. Further, there could be no inquiry in those circumstances. The Ordinance is in essence a criminal and penal statute—the courts below regarded it as plainly punitive legislation—and before an order for execution is made there must be an inquiry.

March 3. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts and the terms of the Peace Preservation Ordinance set out above and continued: The argument of counsel for the appellant before

(1) (1850) 16 Q. B. 162, 171.
(2) 7 Term Rep. 270.
(3) [1937] A. C. 898, 917.

their Lordships' Board proceeded on the following lines. He submitted that by the order of 1942 all the inhabitants of the proclaimed district were charged with the sum of 321*l.* 16*s.* 11*d.*, and that it was the duty of the District Commissioner first to ascertain who were the inhabitants of the district at the time when the additional police were stationed there, secondly, to conduct a judicial inquiry as to the respective means of these inhabitants and, thirdly, to apportion the 321*l.* 16*s.* 11*d.* among such of these inhabitants as possessed any means, according to the amount of their respective means. He further submitted that if even one inhabitant with means was excluded from the assessment the whole assessment would be invalid, and in support of this submission he cited *Rex* v. *Churchwardens and Overseers of Maddern* (1) and *Rex* v. *Inhabitants of Darlington* (2). While conceding that the appellant was an inhabitant of the proclaimed district at the material time, counsel contended that the purported assessment on the appellant was invalid and illegal because he was given no opportunity of attending an inquiry or of showing cause why he should not be assessed. Counsel finally submitted that before the District Magistrate issued the writs of attachment he should have given the appellant an opportunity of showing cause against their issue.

Their Lordships take the view that this appeal must fail, on the ground that the proceedings whereof the appellant makes complaint were lawful and regular throughout. The appellant did not seek to challenge the proclamation of September 27, 1942, or the order of November 30, 1942. As to the assessment made by the District Commissioner, their Lordships cannot accept the argument that s. 9 of the Ordinance imposes on the District Commissioner the burden of carrying out the elaborate procedure outlined in counsel's argument. It seems to their Lordships most unlikely that those who framed the Ordinance ever contemplated any such procedure for the purpose of spreading, amongst the inhabitants of a proclaimed district, the cost of providing additional constabulary or police; apart from the difficulty of ascertaining exactly what persons were "inhabiting" the proclaimed district at the time when the additional police were stationed there, and of assessing persons who might have left the district shortly afterwards, it is difficult to see how the District Commissioner could conduct a judicial inquiry into the

(1) 1 Term Rep. 625. (2) 6 Term Rep. 468.

respective means of the inhabitants without having any power of compelling parties to attend and disclose their means. Moreover, the wording of s. 9, and in particular the phrases " after inquiry, if necessary " and " according to his judgment " of their respective means " are, in their Lordships' opinion, quite inconsistent with the view that the District Commissioner was to be bound to hold anything in the nature of a judicial inquiry. In their Lordships' view, s. 9 of the Ordinance contemplates a simple and ministerial proceeding on the part of the District Commissioner. He has to form an honest opinion as to how the sum prescribed by the Governor ought fairly to be borne by the inhabitants, acting on the principle that the greater a person's means, the greater the sum which he should be called on to pay. It is contemplated that the District Commissioner may carry out this duty without making any inquiry, but if, for instance, he has been recently appointed, he may think it right to supplement his knowledge by questioning persons more familiar with the district. Their Lordships can find nothing in the section which compels the District Commissioner to give each inhabitant, on whom he proposes to make an assessment, an opportunity of being heard before the assessment is made.

Counsel suggested that the reference to " moneys ordered by " a Court to be paid," in the concluding sentence of s. 9, indicated that the proceedings of the District Commissioner were of a judicial nature, but in their Lordships' view this suggestion is ill-founded. The sentence in question in no way indicates that the moneys payable under the section are moneys ordered by a court to be paid. They clearly are not. All that the sentence does is to apply, to the levying of moneys payable under the section, the law for the time being in force for the levying of moneys ordered by a court to be paid. This is no doubt a convenient method of avoiding the necessity for setting out at length special rules which are to be applicable to the levying of moneys payable under the section.

Turning now to the issue of the two writs of attachment by the District Magistrate, their Lordships can see no ground for the suggestion that the appellant should have been given an opportunity of showing cause against their issue. The assessment having been made, the District Commissioner and the District Magistrate were entitled to proceed exactly as they would have proceeded had the former obtained orders of a competent court for payment by the appellant of two sums of

3*l.* 18*s.* 9*d.* and 1*l.* 10*s.* 6*d.* Had there been such orders, the appellant would not have been entitled to be heard before the issue of writs of attachment, and their Lordships can find nothing irregular in the proceedings up to and including the issue of the writs of attachment. These proceedings appear to have been, in all respects, the appropriate proceedings for the levying of moneys ordered by a court to be paid, and, this being so, the provisions of s. 9 of the Ordinance have been carried out. On this part of the case, counsel suggested that the provisions of s. 9 were in the nature of a " mass punishment " of the inhabitants of the proclaimed district, and he relied on the well-known passage from the judgment of the court in *Bonaker* v. *Evans* (1), " no proposition can be more clearly " established than that a man cannot incur the loss of liberty " or property for an offence by a judicial proceeding until he " has had a fair opportunity of answering the charge against " him, unless indeed the legislature has expressly or impliedly " given an authority to act without that necessary preliminary. " This is laid down in [here a number of cases are " mentioned] and many other cases, concluding with that of " *Capel* v. *Child* (2), in which Bayley B. says he knows of " no case in which you are to have a judicial proceeding, by " which a man is to be deprived of any part of his property, " without his having an opportunity of being heard."

Their Lordships realize that if this appeal fails the appellant will be deprived of a part of his property without having had an opportunity of being heard either by the District Commissioner or by the District Magistrate, but this unusual situation arises from legislation couched in unusual terms and designed to meet what is, their Lordships hope, an unusual situation. The Ordinance contemplates that a riot has broken out in a particular part of the Gold Coast, and that it has become necessary to send additional police to that part in order to quell the riot and protect the persons and property of the inhabitants. In placing the cost of this protection on the inhabitants of that part of the Gold Coast, the Ordinance does not inflict anything in the nature of a mass punishment. It merely provides that those who have had the protection must pay for it, and it provides a rough and ready method of securing that, in substance, the burden shall be borne by those who are best able to bear it, and who, in all probability, had the most property to be protected. Their Lordships have already

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(1) 16 Q. B. 162, 171.

(2) (1832) 2 C. &. J. 558.

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indicated that, in their view, the section does not contemplate any judicial proceeding, and thus a decision against the appellant does not infringe the principles stated in *Bonaker* v. *Evans* (1). As their Lordships can find nothing irregular or unlawful in the proceedings whereof complaint is made by the appellant, it follows that the courts in West Africa were right in dismissing the appellant's application for a writ of prohibtion. It is therefore unnecessary to consider the further reasons against the issue of such a writ which were put forward by counsel for the respondents.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondents.

Solicitors for appellant : *A. L. Bryden & Co.*
Solicitors for respondents : *Burchells.*

(1) 16 Q. B. 162.

[PRIVY COUNCIL.]

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Apr. 20.

NAIM MOLVAN, OWNER OF MOTOR VESSEL "ASYA" . . . . APPELLANT ;

AND

ATTORNEY-GENERAL FOR PALESTINE RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine — Immigration — Vessel carrying illegal immigrants — Stopped on the high seas—Escorted into Palestinian territorial waters —Forfeiture of vessel—Validity—International law—Mandate for Palestine, arts. 1, 4, 6—*Immigration Ordinance,* 1941 (*as amended by the Defence* (*Emergency*) *Regulations,* 1945), *s.* 12, *sub-s.* 3 (i.) (*b*) —*Palestine* (*Defence*) *Order in Council,* 1937 (*St. R. & O.* 1937, *No.* 225).

The Immigration Ordinance, 1941, of Palestine, as amended by the Defence (Emergency) Regulations, 1945, made under the Palestine (Defence) Order in Council, 1937, after making provision, by s. 5, for the exclusion from Palestine of certain categories of persons and, by s. 8, for the inspection, detention and removal of intending immigrants, provided by s. 12, sub-s. 3 (i.) (*b*), that ". . . . the . . . . owner . . . . of a vessel . . . . [is] deemed "to have abetted the unlawful immigration of any person . . . . "who is proved to have been on board the vessel . . . . in . . . . "the territorial waters [of Palestine], whether that person or "vessel . . . . came there voluntarily or not . . . ."

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* *Present :* LORD SIMONDS, LORD MORTON OF HENRYTON and SIR MADHAVAN NAIR.

The motor vessel *Asya*, when first sighted by a British destroyer on the high seas some 100 miles south-west of Jaffa, was flying no flag, but later hoisted a Turkish flag. Having made no reply on being asked her destination by signal, a boarding party was sent from the destroyer and on its arrival on the ship the Turkish flag was hauled down and the Zionist flag hoisted. Under the escort of the destroyer, the boarding party brought the *Asya* to the outer harbour of Haifa, where the police and immigration authorities boarded her. There were seven hundred and thirty-three passengers on board, none of whom had any passport or travel document or visa to enter Palestine. There was no passenger list nor any usual ship's papers. The Supreme Court of Palestine having affirmed an order of the District Court of Haifa whereby, on an application by the respondent, the Attorney-General for Palestine, under the provisions of s. 12 of the Immigration Ordinance, 1941, that court had confirmed and ordered the forfeiture of the *Asya* to the Government of Palestine on the ground that she was within the territorial waters of Palestine in circumstances in which the owner of the vessel was deemed to have abetted the unlawful immigration of the passengers, the owner, the appellant, now appealed:

Held, first, that it had been properly inferred that the passengers intended, if possible, to effect an illegal landing in Palestine.

Held, secondly, and assuming it to be a justiciable issue, that there was no reason to suppose that the Immigration Ordinance (which was general in its application to persons of any nation and any creed) departed in the smallest degree from the terms of the Mandate for Palestine or was in any measure repugnant to or inconsistent with its provisions. The facilitation of Jewish immigration was expressly made subject to the term that the Administration should ensure that the rights and position of other sections of the population were not prejudiced and to the further term that the immigration should be under suitable conditions.

Held, thirdly, that on construction there was no room for limiting the meaning of "owner" where it occurred in the Ordinance to persons who were either Palestinian citizens or resident in Palestine; that the words "whether that person or vessel . . . . came there "voluntarily or not" meant "however it got there"; and that the Ordinance so read was not ultra vires and invalid as infringing any principle of international law. As a result of the bringing of the *Asya* within territorial waters under compulsion, whether that act was right or wrong, the vessel was in fact in a Palestinian port and the terms of the Ordinance demanded its forfeiture.

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Further, the Ordinance was not open to challenge on the ground that it offended against any established principle of international law even on the assumption that it directly authorized, in the circumstances in which those acts were done, the seizure of the *Asya* on the high seas and her compulsory direction to a Palestinian port. The proposition that the *Asya*, under the shield of the doctrine of " the freedom of the open sea," was entitled, whatever her mission might be, to sail the open sea off the coast of Palestine, or that any such right, unqualified by place or circumstance, was established by international law, could not be assented to. In any case, no question of comity or of any breach of international law could arise if there was no State under whose flag a vessel sailed, and in the present case the *Asya*, having no usual ship's papers which would serve to identify her, flying the Turkish flag, to which there was no evidence that she had a right, hauling it down on the arrival of the boarding party and later hoisting a flag which was not the flag of any State in being, could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure.

Dictum of Lord Alverstone C.J. in *West Rand Central Gold Mining Co.* v. *Rex* [1905] 2 K. B. 391, at 407, referred to.

Statement in Oppenheim's International Law, 6th ed., vol. I, p. 546, that " in the interest of order on the open sea a vessel " not sailing under the maritime flag of a State enjoys no protection " whatever, for the freedom of navigation on the open sea is freedom " for such vessels only as sail under the flag of a State," approved.

Held, lastly, that no principle of international law was violated by an Ordinance which, in the circumstances in which the Ordinance of 1941 was passed, penalized, by forfeiture of their property within the jurisdiction, persons of whatever nationality and wherever resident, who abetted or were deemed to have abetted an offence against its laws. Even if any principle of general acceptation could be found which appeared to cover the case, it would still remain to be considered whether an exception must not be made in the case of a Mandatory Power enforcing by action, which seemed to it essential, the policy which the Principal Allied Powers had entrusted to its charge.

Judgment of the Supreme Court of Palestine affirmed.

APPEAL (No. 36 of 1947) by Naim Molvan, the owner of the motor vessel *Asya*, from a judgment of the Supreme Court of Palestine, sitting as a court of civil appeal at Jerusalem (November 11, 1946) which dismissed an appeal from an order of the District Court of Haifa (June 14, 1946) whereby that court, on the application of the Attorney-General for Palestine, the present respondent, under the provisions of s. 12 of the Immigration Ordinance, 1941, as amended, confirmed and ordered the forfeiture of the vessel to the Government of Palestine. The following facts, which were not disputed, are taken from the judgment of the Judicial Committee. On March 27, 1946, the *Asya* was sighted by a British destroyer, H.M.S. *Chequers*, on the high seas some 100 miles south-west of Jaffa. She was flying no flag when first sighted but later hoisted the Turkish flag. Then the destroyer hailed her and asked her destination by signal, to which she made no reply. A boarding party of eighteen persons was sent from the destroyer and when it arrived on the ship the Turkish flag was hauled down and the Zionist flag was hoisted. Four charts on the ship appeared to have on them a course with fixes from La Ciotet Bay, in France, to a port just north of Tel-Aviv. The boarding party brought the *Asya* under the escort of the destroyer to the outer harbour of Haifa. The *Asya* was a freighter with little accommodation for passengers but the hold had been fitted with tiers of bunks. There were seven hundred and thirty-three persons on board, none of whom had any passport or travel document or visa to enter Palestine. There was no passenger list nor any usual ship's papers. On the arrival of the *Asya* at Haifa the police and immigration authorities boarded her on March 28, 1946, and put the passengers ashore and sent them to a clearance camp at Athlit, near Haifa, where the immigration officer signed a warrant of detention for them.

On April 18, 1946, the respondent applied to the District Court of Haifa for an order confirming the forfeiture of the vessel to the Government of Palestine under s. 12 of the Immigration Ordinance, 1941, on the ground that on March 27, 1946, seven hundred and thirty-three persons were on board the vessel within the territorial waters of Palestine in circumstances in which the master, owner or agent of the vessel was deemed to have abetted the unlawful immigration of those persons. On June 14, 1946, the learned trial judge in the District Court made an order confirming the forfeiture. From that order an appeal was preferred to the Supreme Court, and on November 11, 1946, that court, consisting of Fitzgerald C.J., Edwards and Shaw JJ., dismissed the appeal.

The relevant statutory provisions appear from the judgment of the Judicial Committee.

1948. Feb. 26; Mar. 1, 2. *Sir Valentine Holmes K.C.* and *Jacob S. Shapiro* for the appellant. This appeal raises questions as to the validity and construction of the legislation under which the forfeiture was ordered, and the sort of questions that arise really depend on the presumption that every statute has to be so interpreted and applied as not to be inconsistent with the comity of nations or with the established rules of international law: Maxwell on Interpretation of Statutes, 7th ed., p. 127. The first submission is that what happened in this case, namely, the seizure of the *Asya* on the high seas and the forfeiture, was contrary to rules of international law, and that either s. 12 of the Immigration Ordinance, as amended, must be so construed that this forfeiture cannot be supported as infringing international law, or, alternatively, if the words of the section are so clear that no other construction is possible but that they do infringe international law, then the Ordinance itself is invalid because the Crown did not confer on the High Commissioner power to make such an Ordinance. The other submission is that the Ordinance is repugnant to and inconsistent with the terms of the Mandate for Palestine. The first submission is that the Palestine (Defence) Order in Council, 1937, under which the regulations amending s. 12 of the Immigration Ordinance of 1941 were made, does not give to the High Commissioner power to make a regulation which is inconsistent with the established rules of international law. Following on that, if the Ordinance, as amended, must be construed as empowering the Palestine Court to forfeit a ship which is neither a Palestinian ship nor the property of a Palestinian citizen or of anybody resident in Palestine, it is inconsistent with the principles of international law if that ship has been seized in the open sea outside territorial waters. This is not a case of a sovereign legislature, and it was said in *Croft* v. *Dunphy* (1) that " legislation of the Imperial Parliament, even " in contravention of generally acknowledged principles of " international law, is binding upon and must be enforced by " the courts of this country . . . . it may be that legislation " of the Dominion Parliament may be challenged as ultra vires " on the ground that it is contrary to the principles of inter- " national law, but that must be because it must be assumed " that the British North America Act has not conferred power " on the Dominion Parliament to legislate contrary to these " principles." The Board there is doing nothing more than applying the above-mentioned general principle from Maxwell's Interpretation of Statutes. Applying the same principle, it must be assumed that the High Commissioner has not the power to legislate contrary to the principles of international law. It would appear from *Croft* v. *Dunphy* (1) that the power can

(1) [1933] A. C. 156, 164.

be legitimately extended to certain matters, but it is submitted that it does not extend to forfeiture. *MacLeod* v. *Attorney-General for New South Wales* (1) again applies the principle in Maxwell. *The Queen* v. *Anderson* (2) does not touch this case, but it was there said that "in considering a statute of this "kind we are at liberty to ascertain as near as we can, what the "international law on the point is, and construe the words of "the statute in harmony therewith." On my first submission, therefore, this Ordinance, as amended, if construed in the way in which it has been construed by the Supreme Court in Palestine, is definitely inconsistent with the principles of international law—that law has not recognized the right of any country to forfeit a ship which has been seized on the high seas and brought by force into a port of that country. There is no authority to stop a ship heading for Palestine with illegal immigrants until it enters the territorial waters of Palestine—the High Commissioner could not have power to make a regulation for the search of a ship on the high seas outside the territorial limits of Palestine.

The second submission is that s. 12 of the Ordinance of 1941, as amended, can be construed in such a way that it does not enable a ship to be forfeited in circumstances such as exist in the present case, and that it ought to be so construed so as not to conflict with international law. The words "voluntarily "or not" cannot be stretched to include a vessel which is brought in from the high seas by the commander of a British warship. If the words "voluntarily or not" are to be given the widest possible meaning, then it is submitted that the forfeiture in these circumstances is a breach of international law: they should not be so read: *Cheyko* v. *Attorney-General* (3); *Attorney-General* v. *Yanoulatos* (4); *Attorney-General* v. *Yanoulatos* (5). Then, still on construction, the words "master, owner or agent" must be construed as meaning "master, owner or agent who is either a Palestinian subject or "resident in Palestine." Here there is no owner in Palestine, and the "owner" in the section must refer to the owner abroad and it must mean that they are creating an offence in respect of a person abroad when that offence has been committed out of the jurisdiction: Halsbury's Laws of England, 2nd ed., vol. 9, p. 56, para. 62. In the "deemed" abetment clause,

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(1) [1891] A. C. 455.
(2) (1868) L. R. 1 C. C. R. 161, 167.
(3) (1941) 8 P. L. R. 138.
(4) (1941) 8 P. L. R. 333.
(5) (1941) 8 P. L. R. 442.

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also, an " owner " must mean an owner in Palestine : *Attorney-General* v. *Nikolaiovitch and Others* (1).

The third submission is that the regulation is repugnant to and inconsistent with the provisions of the Mandate for Palestine, and is therefore invalid by reason of ss. 17 and 19 of the Palestine Order in Council, 1922. The object of the Ordinance of 1941 is certainly not to " facilitate Jewish immi-" gration " : para. 6 of the Mandate : the Ordinance actually impedes it, and is capable of being used to stop it completely.

Le Quesne K.C., *Gahan* and *J. G. Le Quesne* for the respondent, were not required to deal with the Mandate point. On the main question, the vessel was in fact found within the territorial waters of Palestine—for the purpose of service of the summons which initiated these proceedings—and there were passengers on board. Under s. 12, sub-s. 3, of the Ordinance of 1941, as amended, and by virtue of that Ordinance, as amended, there arose on those facts a rebuttable presumption that the owner of the vessel had abetted unlawful or prohibited immigration. He is deemed to have abetted it. That presumption has not been rebutted in any one of the ways provided in s. 12, sub-s. 3. The owner has therefore failed in showing cause against the making of an order in confirmation of forfeiture. That is how the matter stands as regards the facts. It is then said for the appellant that none the less the courts below ought not to have confirmed the forfeiture because the Ordinance, as amended, under which they acted is invalid because there was no power in the High Commissioner to enact it under the Palestine (Defence) Order in Council, 1937. That is the main point, and the argument rests on the application to this Ordinance of the doctrine, said to have been laid down in *MacLeod's* case (2), that a subordinate legislature in the exercise of the powers conferred on it, must not enact anything which would infringe the rules of international law. The decision in *MacLeod's* case (2) has been very much discussed, and the right explanation of that decision may be not that the powers granted to the subordinate legislature were granted only on condition that their exercise should not clash with international law, but rather that they were granted on condition that they should be exercised by the subordinate legislature in regard to its own territory. That is the view which was taken by the authors of the Statute of Westminster. [Reference was made to Craies on Statute Law, 4th ed., pp. 164, 429.] My first observation about the doctrine in *MacLeod's* case (1) is that it may be, and probably is, true to say that one is concerned there with a constitutional rule limiting the legislative competence of a subordinate legislature. For the appellant reliance was placed on a passage in *Croft* v. *Dunphy* (2), but, strictly speaking, those words are obiter, because no question of international law was necessary to be decided for the purposes of that case. Apart from that, however, it is submitted that the words there used by the Board are not susceptible of the meaning contended for by the appellant. Even under the British North America Act the legislative authority of the subordinate legislature has not been limited strictly to the territorial limits of Canada: *Attorney-General for Canada* v. *Cain* (3). Further, the instrument of legislation, and the method of legislation, being dealt with here are not exactly the same as arose in *MacLeod's* case (1), *Cain's* case (3) and *Croft* v. *Dunphy* (2), in all of which a superior legislature had delegated powers to a subordinate legislature. Here we are dealing with legislative powers which have not been created by delegation, but which were part of the prerogative of the Crown. [Reference was made to the Foreign Jurisdiction Act, 1890, and to Hall's Foreign Jurisdiction of the British Crown, 1894 ed., p. 9, s. 8.] The legislative power here is inherent in the prerogative, and by the Foreign Jurisdiction Act Parliament does not delegate legislative powers, it merely regulates the exercise of them. It is submitted, therefore, that this Order in Council of 1937 has the same effect as a statute. An Imperial statute may authorize someone to make an Ordinance, or regulation, which conflicts with international law—it may do that by express terms or by necessary implication. The principle laid down in *MacLeod's* case (1) should be confined to delegated legislation. The above submission, if right, will end this appeal. [Reference was made to the note on p. 170 of Craies on Statute Law.] The Order in Council of 1937 is a far more drastic and stringent one than its two predecessors.

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(1) (1940) 7 P. L. R. 1.

(2) [1891] A. C. 455.

Next, on the question whether there is any repugnancy between the Ordinance, as amended, and a rule of international law, if the rule is not precise it is very difficult to decide whether there is any repugnancy, and very much more difficult to decide

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(1) [1891] A. C. 455.
(2) [1933] A. C. 156, 164.
(3) [1906] A. C. 542, 545.

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whether it is invalid on the ground of such repugnancy. In view of the passages in Hall's International Law, 8th ed., at pp. 328, 329, s. 86, it cannot be said that what the destroyer did was against international law when regard is had to what she had discovered—the *Asya* was engaged in an enterprise of trying to defeat the immigration laws. [Reference was also made to Oppenheim's International Law, 6th ed., Pt. II., p. 450.] In that state of international law, when one considers what was confronting the authorities in Palestine—a series of attempts to bring into Palestine contrary to law large numbers of illegal immigrants—there is no rule of international law as it exists that would forbid this vessel at sea being brought in within the three mile limit: *West Rand Central Gold Mining Co.* v. *Rex* (1). Next, with regard to the general conduct of the *Asya*—and she was not carrying the usual ship's papers—the facts would be sufficient to support the respondent's case quite apart from anything else: Oppenheim's International Law, supra, at p. 546, states that "In the interest of order on the "open sea a vessel not sailing under the maritime flag of a State "enjoys no protection whatever." In this case and in these circumstances this vessel under international law is not entitled to say that the destroyer had no power to interfere with her. On the question whether the Ordinance, as amended, could be treated as applying only to Palestinian ships, if the right of interference is established the Ordinance could not be limited in that way. As to the meaning of "voluntarily or not," it means, as the Supreme Court said, "however it got there." [Reference was made to *Attorney-General* v. *Yanoulatos* (2) and *Yanoulatos* v. *Attorney-General* (3).]

Summarizing, it is submitted that this case can in fact be put properly as it was put by the courts below—that the vessel had been found within the jurisdiction and the facts necessary to be established for a declaration of forfeiture had been proved. If it is necessary to go on and consider it as based on *MacLeod's* case (4), then it is submitted that the principle as laid down regarding legislative powers delegated to a subordinate legislature by the Imperial Parliament does not apply to the exercise of the powers belonging to the prerogative which the Crown has authorized them to exercise. Perhaps the ultimate question is the construction of the Order in Council of 1937, and on a proper construction it cannot be held not to empower this Ordinance, as amended. As regards international law, it is submitted (i.) that, quite apart from any question of the vessel's conduct, there is no fixed and definite rule of international law which has been violated in this case, and (ii.) in any event the conduct of the *Asya* as regards flag and ship's papers makes it impossible for her to contend that what happened was contrary to international law.

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(1) [1905] 2 K. B. 391, 407.
(2) 8 P. L. R. 442, 445.
(3) (1942) 9 P. L. R. 29.
(4) [1891] A. C. 455.

Sir Valentine Holmes K.C. replied. As the Order in Council of 1937 does not expressly or by necessary implication give the High Commissioner power to make a regulation which is either contrary to the rules of international law or has extra-territorial effect, no such regulation can be made.

April 20. The judgment of their Lordships was delivered by Lord Simonds, who stated the facts set out above and continued : From these facts the inference has been drawn that the passengers intended, if possible, to effect an illegal landing in Palestine. In their Lordships' opinion the inference was properly drawn. It is necessary for a proper understanding of the appeal which has now been brought to His Majesty in Council to state at some length the relevant instruments under and by virtue of which the vessel was forfeited to the Government of Palestine. In the first place, since learned counsel for the appellant has based an argument on its terms, reference must be made to the Mandate under which His Majesty acts as the Mandatory Power for Palestine. By the Mandate it is provided as follows :

"1. The Mandatory shall have full powers of legislation "and of administration, save as they may be limited by the "terms of this mandate.

. . . .

"4. An appropriate Jewish agency shall be recognized "as a public body for the purpose of advising and co-"operating with the Administration of Palestine in such "economic, social and other matters as may affect the "establishment of the Jewish national home and the "interests of the Jewish population in Palestine, and, subject "always to the control of the Administration, to assist and "take part in the development of the country.

. . . .

"6. The Administration of Palestine, while ensuring that "the rights and position of other sections of the population "are not prejudiced, shall facilitate Jewish immigration "under suitable conditions and shall encourage, in co-"operation with the Jewish agency referred to in Article 4, "close settlement by Jews on the land, including State lands "and waste lands not required for public purposes."

By the Palestine Order in Council, 1922 (which was amended by the Palestine (Amendment) Order in Council, 1923, and will be cited as so amended), His Majesty after reciting (inter alia) that the principal Allied Powers had selected him as the Mandatory for Palestine and that by treaty, capitulation, grant, usage, sufferance and other lawful means he had power and jurisdiction within Palestine, by virtue and in exercise of the powers in that behalf by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested was pleased by and with the advice of His Privy Council to order, and it was thereby ordered, inter alia, as follows:

"17. (1.) (*a*) The High Commissioner shall have full power "and authority, without prejudice to the powers inherent in, "or reserved by this Order to His Majesty, and subject "always to any conditions and limitations prescribed by any "such instructions as may be given to him under the Sign "Manual and Signet or through a Secretary of State, to "promulgate such Ordinances as may be necessary for the "peace, order, and good government of Palestine, provided "that no Ordinance shall be promulgated which shall restrict "complete freedom of conscience and the free exercise of all "forms of worship, save in so far as is required for the "maintenance of public order and morals; or which shall "tend to discriminate in any way between the inhabitants of "Palestine on the grounds of race, religion, or language.

. . . .

"(*c*) No Ordinance shall be promulgated which shall be in "any way repugnant to or inconsistent with the provisions "of the Mandate and no Ordinance which concerns matters "dealt with specifically by the provisions of the Mandate "shall be promulgated until a draft thereof has been com-"municated to a Secretary of State and approved by him, "with or without amendment."

In exercise of the powers so conferred on him the High Commissioner duly made divers Ordinances relating to immigration into Palestine and matters connected therewith, and these were consolidated in the Immigration Ordinance No. 5 of 1941. But before the happening of the events out of which this appeal arises this Ordinance was varied by regulations made by the High Commissioner under the Palestine (Defence) Order in Council, 1937, and it is convenient to refer first to that instrument. Following on earlier so-called " Defence " Orders in Council it was of a drastic character. Its title indicates that its essential purpose was the defence of Palestine and, in fact, it conferred very large powers on the High Commissioner. By it " law " was defined to include any Order of His Majesty in Council and any Ordinance, Ottoman Law, order, rule, regulation, by-law or other law for the time being in force in Palestine, and by s. 6 it was provided that the High Commissioner might make such regulations (in that Order referred to as " Defence Regulations ") as appeared to him in his unfettered discretion to be necessary or expedient for securing the public safety, the defence of Palestine, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community, and, without prejudice to the generality of the powers so conferred, by Defence Regulations (*a*) to make provision for the detention of persons and the deportation and exclusion of persons from Palestine, and (*d*) to amend any law, suspend the operation of any law, and apply any law with or without modification. By s. 6, sub-s. 4, it was provided that a Defence Regulation or any order, rule or by-law made in pursuance of such a regulation should have effect notwithstanding anything inconsistent therewith contained in any law.

The character and wide scope of the powers given to the High Commissioner are relevant to the question, which has been much debated before their Lordships, whether the regulations which will now be considered were validly made. As has already been stated, Ordinances dealing with immigration into Palestine were made at an early date in the administration of the Mandatory. Nothing was more important to the peace and good government of the country. In 1945 the High Commissioner found it necessary to make Defence Regulations amending the existing Immigration Ordinance of 1941, and the relevant provisions of that Ordinance as so amended must now be referred to. The Ordinance, after certain definitions which included that of " Commanding Officer " as " the commander " or officer in charge of any ship or boat in His Majesty's " service or in the service of the Government of Palestine," and after making provision (by s. 3) for the boarding of any vessel for the detention and examination of any person reasonably supposed to be a foreigner who desired to enter or to leave Palestine as therein mentioned, and (by s. 5) for the exclusion from Palestine of certain categories of persons and (by s. 8) for the inspection, detention and removal of intending immigrants, by s. 12 defined the offences and prescribed the penalties which are relevant to the present proceedings.

The material parts of s. 12 (as amended) are as follows:

"(1.) If any person acts in contravention of or fails to "comply with any of the provisions of this Ordinance or any "order or rule made thereunder, or aids or abets in any such "contravention, or harbours any person who he knows, "or has reasonable ground to believe, has acted in contra- "vention thereof, he shall be guilty of an offence under this "Ordinance.

. . . .

"(2.) Any foreigner who—(*a*) enters Palestine in contra- "vention of section 5 . . . . shall on being found in Palestine "be guilty of an offence under this Ordinance.

. . . .

"(3.) (i.) for the purposes of this sub-section—

"(*a*) a person abets the commision of an offence if he "aids counsels or procures the commission of the offence "whether or not the person abetted does in fact commit "the offence or is capable in law of committing it:

"(*b*) without prejudice to the provisions of this "Ordinance relating to actual abetment, the master owner "and agent of a vessel and the commander owner and "agent of an aircraft are all deemed to have abetted the "unlawful immigration of any person (hereinafter called "'that person') who is proved to have been on board the "vessel or aircraft in Palestine or the territorial waters "thereof, whether that person or the vessel or aircraft "came there voluntarily or not unless it is proved—

"(i.) that that person did not enter or attempt to "enter Palestine and did not intend so to do.

* * * * * * *

"(ii.) any person who abets any other person in any "contravention or attempted contravention of this "Ordinance or any rule or order made by virtue thereof "or harbours any person whom he knows or has reason "to believe to have contravened or attempted to con- "travene this Ordinance or any rule or order made by "virtue thereof and any master owner or agent of a "vessel or commander owner or agent of an aircraft "who is deemed for the purpose of this sub-section "to have abetted the unlawful immigration of any "person, shall be guilty of an offence and may be tried "summarily therefor by a District Court and shall be "liable on conviction to a fine of one thousand pounds "or to imprisonment for eight years or to both such "fine and imprisonment.

* * * * * * *

"(iii.) if any vessel, to the knowledge of the master "owner or agent or any aircraft to the knowledge of the "commander owner or agent or any vehicle or other "means of conveyance to the knowledge of the owner or "person in charge thereof is used in any contravention "or attempted contravention of this Ordinance or any "order or rule made by virtue thereof or in the "abetment of any contravention or attempted contravention of this Ordinance or any order or rule made "by virtue thereof . . . . or if any person is proved "to have been on board a vessel or aircraft in circumstances in which the master owner or agent of the "vessel or the commander owner or agent of the aircraft "is deemed to have abetted the unlawful immigration "of that person then:

"(*a*) the vessel aircraft vehicle or other means of "conveyance, as the case may be, shall, save as "hereinafter provided, be forfeited to the Government;

"(*b*) if in any criminal prosecution facts are "established to the satisfaction of the Court which "render a vessel aircraft or vehicle or other means "of conveyance forfeited to the Government, the "Court may by order confirm such forfeiture and "such order shall save as provided in paragraph (*e*) "be conclusive as to such forfeiture;

"(*c*) in the absence of any order of a criminal Court "confirming a forfeiture as above, the forfeiture may "be confirmed by order of a District Court on the "application by way of summons of the Attorney-"General or his representative, such application being "served on the master owner or agent of the vessel ". . . . or being served by affixing a copy thereof

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"to the vessel aircraft vehicle or other means of "conveyance: and the owner of the vessel aircraft "vehicle or other means of conveyance shall have "the right to show cause against the making of the "order:

. . . .

"(*e*) an order of any Court confirming a forfeiture "shall be subject to appeal as near as may be as "though it was a judgment of a District Court in a "civil action between the Attorney-General as plain-"tiff and the owner of the vessel aircraft or other "means of conveyance as defendant."

Section 13 further defines for the purpose of that section the expression "prohibited immigrant" and provides by sub-ss. 2 and 3 for the pursuit by any Commanding Officer of any vessel or aircraft within the territorial waters of Palestine which he believes may be carrying persons intending to enter Palestine and for the boarding and searching of such vessel or aircraft, and by sub-s. 6 for the detention by any Commanding Officer or authorized officer of any vessel, aircraft, vehicle or other means of conveyance, which he may have reason to suspect to be liable to forfeiture, until the question of forfeiture is determined.

On the application of the respondent for an order confirming the forfeiture of the *Asya* there was no suggestion that there was any other person than the owner who was under the Ordinance to be deemed to have abetted any offence thereunder, and it was the appellant, the owner, who appeared to show cause against the forfeiture. Numerous contentions were put forward on behalf of the owner before the District Court and the Supreme Court of Palestine, not all of which have been maintained before their Lordships. But throughout the proceedings it has been urged that the relevant provisions of the Ordinance are invalid as being repugnant to, or inconsistent with, the provisions of the Mandate for Palestine. That this is a justiciable issue their Lordships will assume. But it appears to them that the validity of the Ordinance cannot on this ground be successfully challenged. If the terms of the Mandate required the Mandatory Power to facilitate Jewish immigration into Palestine under any conditions and at any cost to other interests, the contention might be maintainable. But the Mandate does not do so. On the contrary, the facilitation of Jewish immigration is expressly made subject to the term that the Administration shall ensure that the rights and position of other sections of the population are not prejudiced and to the further term that the immigration shall be under suitable conditions. Their Lordships see no reason to suppose that the Immigration Ordinance (which is general in its application to persons of any nation and any creed) departs in the smallest degree from the terms of the Mandate or is in any measure repugnant to or inconsistent with its provisions.

The second ground of appeal which has been maintained before their Lordships was stated in the form of a dilemma. The relevant facts for this purpose being that the appellant is not a Palestinian citizen now resident in Palestine and that the *Asya* is not a Palestinian vessel, the assumption of law was then made that the power conferred on the High Commissioner by the Palestine Order in Council to make Ordinances or by the Palestine (Defence) Order in Council to make Emergency Regulations varying any law was a delegated legislative power strictly comparable with that conferred by an Act of the Imperial Parliament on a Colonial legislature. From this assumption it followed, so it was contended, that it was not competent for the High Commissioner to make any Ordinance or Regulation which violated any established principle of international law. Then the dilemma was posed. Either the Ordinance as amended must be so construed as not to touch the owner of a vessel who was neither a Palestinian citizen nor within the local jurisdiction of Palestine, or, if such a construction was not admissible, then the Ordinance must pro tanto be regarded as ultra vires and invalid. Linked with this contention was a further argument that in the relevant section of the Ordinance, namely, s. 12, sub-s. 3 (i.) (*b*), the words " whether that person or the vessel or aircraft came there " voluntarily or not " must in some way be construed so as not to cover the case of a vessel which, though in fact found within the territorial waters of Palestine, had been brought there under escort of a British man-of-war after capture on the high seas. And here, too, it was argued that, if it was so construed as to permit the forfeiture of a vessel forcibly directed from the high seas to a Palestinian port, the Ordinance was ultra vires and invalid as infringing a principle of international law.

Their Lordships will, for the purpose of this case, assume that the power vested in the High Commissioner by Order in Council is analogous to that conferred on a Colonial legislature by an Act of the Imperial Parliament and subject to the same limitations. They do not decide the question and it may well be that different considerations apply to a delegation of legislative power by virtue of the prerogative from those which have been held in the past to govern the relations of the Imperial and Colonial legislatures. Such relations have a historical basis which has no exact counterpart in the somewhat anomalous creation of the Government of Palestine under an immediate exercise of the prerogative and under the ultimate authority of the Mandate. On the footing, however, that the initial proposition of law is valid, the dilemma posed by learned counsel must be examined. The construction of the Ordinance does not appear to present any doubt or difficulty. In the first place, the meaning of the words "whether that person or the "vessel or aircraft came there voluntarily or not" is plain. They do not admit of the gloss which is sought to be put on them. Either the vessel came voluntarily into Palestinian waters or it did not. There is no tertium quid. In effect, the words bear the meaning which the Supreme Court of Palestine put on them, "however it got there." In the next place, there is no room for limiting the meaning of the words "master, "owner or agent," where they occur in this Ordinance, to persons who are either Palestinian citizens or resident in Palestine. It may be stated as a general rule of construction (though it is subject to some qualification) that, since, as it is sometimes phrased, "crime is local," a statute creating an offence and imposing a penalty for it should be so construed as to apply only to those persons who by virtue of residence or, in some cases, citizenship or nationality, are regarded as subject to the jurisdiction of the State which has enacted the statute: see, e.g., *MacLeod* v. *Attorney-General for New South Wales* (1). But in the present case it would largely stultify the purpose and effect of the Ordinance if, wherever the words "master, owner "or agent" occur, they were so limited in meaning. The words must clearly bear the same meaning wherever they occur, and that can only be their natural meaning unqualified by reference to the general rules above-mentioned. To this matter their Lordships will recur.

On the footing, then, that the material words in the Ordinance mean just what they say, the other branch of the dilemma must be examined. Is the Ordinance, so read, ultra vires and invalid? Let the terms of the Ordinance be applied to the facts of this case. The *Asya* carrying unlawful immigrants was, whether

(1) [1891] A. C. 455.

voluntarily or not, in Palestinian territorial waters. The unlawful immigration was an offence under the Ordinance and the owner, the appellant, is deemed to have abetted that offence unless he can escape under one or other of the sub-clauses of s. 12, sub-s. 3 (i.) (*b*). This he has not done. Therefore under s. 12, sub-s. 3 (iii.) (*a*), the *Asya* is forfeited to the Government of Palestine, and the court must confirm the forfeiture unless the appellant can show cause against it. It is to be noted, as the appellant's learned counsel with his usual candour admitted, that the issue would be precisely the same if the *Asya* had been sighted, boarded and directed to port, while hovering immediately outside the territorial waters of Palestine with a view to making an illegal landing of her passengers under cover of darkness. An Ordinance designed to discourage such an attempt by providing for the forfeiture of the vessel would, it was contended, be invalid.

Their Lordships have grave doubt whether it is open to the appellant in the circumstances of the present case to challenge the validity of the Ordinance on the ground that the vessel was brought within territorial waters under the compulsion of the British Navy. That act, whether or not it was a breach of any principle of international law, a matter presently to be discussed, was not done or purported to be done under the authority of the Ordinance. The appellant has himself relied on the fact that the Ordinance itself gives a limited right of pursuit and search which would be inconsistent with a larger right being thereby created. But as a result of the act, right or wrong, the vessel was in fact in a Palestinian port and the terms of the Ordinance demanded its forfeiture. The argument of the appellant has assumed that the Ordinance is to be read as if it authorized seizure of the *Asya* on the high seas and its validity was to be determined accordingly. It would appear that this assumption has been rejected in the courts of Palestine and, as their Lordships think, rightly. But inasmuch as the matter has been debated before them with much reference to authority, they think it right to say that in their opinion the Ordinance is not open to challenge on the ground that it offends against any established principle of international law, even on the assumption that it directly authorized, in the circumstances in which those acts were done, the seizure of the *Asya* on the high seas and her compulsory direction to a Palestinian port. The appellant cannot succeed in this plea unless he invokes a doctrine which is, in the words of Lord Alverstone C.J. in

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West Rand Central Gold Mining Co. v. *Rex* (1), "one really "accepted as binding between nations." It must be shown by satisfactory evidence, that learned judge adds, "either that "the particular proposition put forward has been recognized "and acted upon by our own country, or that it is of such a "nature, and has been so widely and generally accepted, that "it can hardly be supposed that any civilized State would "repudiate it. The mere opinions of jurists, however eminent "or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express "sanction of international agreement, or gradually have grown "to be part of international law by their frequent practical "recognition in dealings between various nations."

To satisfy this test the appellant has invoked the doctrine which is called "the freedom of the open sea," alleging that under the shield of that doctrine the *Asya* was entitled, whatever her mission might be, to sail the open sea off the coast of Palestine. Their Lordships cannot assent to the proposition that any such right, unqualified by place or circumstance, is established by international law. There is room for much discussion within what limits a State may for the purpose of enforcing its revenue or police or sanitary law claim to exercise jurisdiction on the sea outside its territorial water. It has not been established that such a general agreement exists on this subject as to satisfy the test laid down by Lord Alverstone, but, even if it had been, it is far from clear that it would be applicable to the case of a Mandatory Power carrying out a common policy, the execution of which had been entrusted to it by other Powers. Their Lordships, therefore, could not in any event conclude that any principle of international law had been violated. But it further appears to them that in the circumstances of the present case a discussion of the problem is somewhat academic. For the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations. The *Asya* did not satisfy these elementary conditions. No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails. Their Lordships would accept as a valid statement of the law the following passage from Oppenheim's International Law (6th ed.), vol. I., p. 546: "In the interest "of order on the open sea, a vessel not sailing under the maritime

(1) [1905] 2 K. B. 391, 407.

" flag of a State enjoys no protection whatever, for the freedom " of navigation on the open sea is freedom for such vessels only " as sail under the flag of a State." Having no usual ship's papers which would serve to identify her, flying the Turkish flag, to which there was no evidence she had a right, hauling it down on the arrival of a boarding party and later hoisting a flag which was not the flag of any State in being, the *Asya* could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure.

If, therefore, contrary to the views which their Lordships have expressed, it is legitimate for the purpose of testing its validity to assume that it expressly authorized that which was done, they come to the conclusion that the Order in Council cannot on this ground be successfully challenged.

The further ground of challenge of the validity of the Ordinance has already been indicated ; namely, that, on the construction which has been put on it, it purports to penalize persons who are neither Palestinian subjects nor residents in Palestine. It is necessary, however, to examine more closely what is the act in respect of which a penalty is to be imposed. The offence itself can only take place in Palestinian territory, for it consists in the unlawful entry into that territory. But it can be abetted by, and can hardly take place without the abetment of, those who are outside the territory. Accordingly, abetment of the offence is itself made punishable. Particularly, the offence can hardly take place without the abetment of the master, owner or agent of the offending vessel, whose actual complicity, while they are outside the jurisdiction, may not easily be susceptible of proof. Therefore such persons are by the terms of the Ordinance " deemed " to have been guilty of abetment and the vessel is liable to forfeiture. The question then is whether there is any principle of international law which is violated by an Ordinance which, in the circumstances in which this Ordinance was passed, penalizes persons of whatever nationality and wherever resident, who abet or are deemed to abet an offence against its laws. It is to be observed that, so far as their own persons are concerned, they cannot be punished so long as they remain outside the jurisdiction. The question therefore narrows down to this, whether they may be penalized by the forfeiture of their property which is within the jurisdiction. Their Lordships have not been referred to any decision nor to any text-book of authority which suggests

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that the enactment by a State of a penalty so expedient, if not essential, for the purpose of preventing an unlawful invasion of its territory, is contrary to any established principle of international law. On this question, also, their Lordships are in accord with the views expressed by the Supreme Court of Palestine, and would only add that even if any principle of general acceptation could be found which appeared to cover the case, it would still, as has already been observed in this judgment, remain to be considered whether an exception must not be made in the case of a Mandatory Power enforcing by action, which seems to it essential, the policy which the Principal Allied Powers entrusted to its charge.

For these reasons, which are an elaboration of those given by the Supreme Court, their Lordships are of opinion that this appeal must be dismissed and they will humbly advise His Majesty accordingly. The appellant must pay the respondent's costs of the appeal.

Solicitors for appellant: *Ince, Roscoe, Wilson & Griggs.*
Solicitors for respondent: *Burchells.*

[PRIVY COUNCIL]

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1948
Mar. 8.

LINZ . . . . APPELLANT;

AND

ELECTRIC WIRE COMPANY OF PALESTINE, LIMITED . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Company — Issue of preference shares — Sale by holder — Subsequent allegation that issue invalid—Claim to recover purchase price—Money had and received—No failure of consideration.

The appellant, who had bought a number of preference shares purporting to have been issued by the respondent company, subsequently sold them for substantially less than she paid for them. Thereafter, alleging that the resolution providing for the issue of the preference shares and their subsequent issue were invalid, she brought an action claiming a refund of the sum paid by her

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* *Present:* LORD SIMONDS, LORD MORTON OF HENRYTON and SIR MADHAVAN NAIR.

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on the ground that she "did not receive the consideration which "she bargained for or any consideration."

Held, that whether the issue of the preference shares was valid or invalid, a matter no longer important to the appellant but vitally important to her transferee, the appellant received something from the company which was worth to her just what she got for it. While not questioning the general proposition that, where an ultra vires issue of shares has been made the subscribers are entitled to recover their money, that does not justify the claim of one, who has sold her shares, at a later date to assert that they have not been lawfully issued, much less to assert, contrary to the plain fact, that there has been, so far as she was concerned, a total failure of consideration.

Rowland v. *Divall* [1923] 2 K. B. 500 inapplicable.

Judgment of the Supreme Court of Palestine affirmed.

Appeal (No. 63 of 1946) from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal (February 7, 1945) which affirmed a judgment and decree of the District Court of Haifa (July 28, 1944) which had dismissed an action by the appellant against the respondent company in which she claimed payment by the respondent of the counter value, with interest, of a sum of Reichsmarks paid by her to the respondent in payment up in full of seven hundred and seventy-five shares of L.P. 1 each in the capital of the respondent purported to be allotted and issued to her as preference shares, on the ground that the shares were shares in the respondent's original capital and that none of them could, having regard to the provisions of its Memorandum of Association, be converted into and issued as preference shares, or, alternatively, on the ground that none of those shares were ever in fact effectively converted into preference shares, and accordingly that she did not receive the preference shares for which she had agreed to subscribe or any other consideration for her payment.

The court of first instance and, on appeal, the Supreme Court of Palestine (Shaw and Frumkin JJ.) dismissed the action.

The facts appear from the judgment of the Judicial Committee.

1948. Feb. 9, 10. *Sir Valentine Holmes K.C.* and *D. Buckley* for the appellant. The two main issues are, first, whether it was within the powers of the respondent company to issue the preference shares. If it was, that is an end of the case, but it is submitted that it was not. The second point is whether, if it was an ultra vires issue, the appellant is entitled to recover the money paid by her as for a consideration which has wholly failed. The respondent company says that the appellant is not entitled to recover the money because in 1939 she sold the preference shares to a third party and that the transfer was in fact recognized in the company's books. The company further says that after action brought it took measures which had the effect of validating the issue. The answers for the appellant, quite shortly, are, first, that the respondent had no answer to an action by the purchaser for the return of the money, and, secondly, it was not proved that measures to validate the issue were taken, but that in any event before action brought the appellant withdrew her application for preference shares. With regard to the principle under which money paid for a consideration which has wholly failed can be recovered by the person who paid it, it was said in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.* (1) that "when one "is considering the law of failure of consideration and of the "quasi-contractual right to recover money on that ground, "it is, generally speaking, not the promise which is referred to "as the consideration, but the performance of the promise." So, in the present case, one has to consider not what the promise was, but whether the company performed that promise, and if it did not, then there is a total failure of consideration notwithstanding that there has been some kind of benefit derived by the promisee by dealing with the subject-matter of the promise. Some help is perhaps to be got from *Rowland* v. *Divall* (2). [Reference was also made to *Lissendan* v. *C. A. V. Bosch, Ld.* (3), *Waverley Hydropathic Co., Ld.* v. *Barrowman* (4) and *In re Bank of Hindustan, China and Japan. Ex parte Alison* (5).]

D. Buckley followed. The time at which the question whether there has been a complete failure of consideration has to be tested is the date when the allotment of the shares was made to the appellant. If there was no consideration on that date moving from the respondent company, it has not done anything since to cause any consideration to move from it to the appellant. If she acquired nothing, the company gave no consideration for the sum which she paid. In this case she got nothing at all, and the fact that she subsequently received cash from another person does not affect the position as between her and the

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(1) [1943] A. C. 32, 48.
(2) [1923] 2 K. B. 500.
(3) [1940] A. C. 412, 417.
(4) (1895) 23 Rettie 136, 139.
(5) (1873) L. R. 15 Eq. 394.

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respondent company. If the issue of the shares was ultra vires no such shares could exist in law. Given that position, there could be no consideration passing to the appellant, and there could be no subsequent act on the part of the company ratifying and creating consideration. On that basis it is clear that there was a total failure of consideration at the inception.

Raymond Jennings K.C., *Quass* and *Dingle Foot* for the respondent company. Assuming that the issue of the preference shares was ultra vires, or, more correctly, that it would have been ultra vires the company to attach preferential rights to the issue of the shares, the submission is that the appellant, having parted with the shares, cannot complain in this action that she received no consideration. The matter is put as a perfectly general principle of law by Lord Dunedin in *Abram Steamship Co.* v. *Westville Shipping Co.* (1).

Sir Valentine Holmes K.C. replied.

March 8. The judgment of their Lordships was delivered by Lord Simonds. In this appeal, which is brought from a judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, affirming the judgment of the District Court of Haifa, a number of questions have been raised which their Lordships do not think it necessary to discuss. They concur in the view of the Supreme Court that the appellant's case can be shortly disposed of and, agreeing as they do with that court's reasons and conclusion, do not propose to examine at length facts and contentions which are not strictly relevant to the question now to be considered.

The respondent is a public company registered in Palestine in October, 1934. By cl. 4 of its Memorandum of Association its capital was L.P. 25,000 divided into 25,000 shares of L.P. 1 each. In April, 1935, one of such shares had been issued to each of the eight subscribers to the memorandum. On April 12, 1935, the eight shareholders purported to pass a resolution which provided that of the unissued share capital of the company L. P. 11,000 should be issued as preference shares carrying the dividend and rights set out therein. The validity of this resolution and of the subsequent issue of preference shares has been challenged on divers grounds. Without determining that question their Lordships will assume for the purpose of this appeal that the issue was invalid. On April 19, 1935, the appellant made a formal application for L.P. 775

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(1) [1923] A. C. 773, 779.

of the said preference shares to be paid for by Reichsmarks in Germany, and such shares were allotted to her on July 7, 1935, after which the relevant certificate was issued to her, and she was duly registered as the proprietor thereof. The transaction was somewhat complicated by the fact that, in consequence of an arrangement made between the respondent company and a company which was conveniently called "Haavara" and of the assumption by the appellant of the obligation to pay certain so-called "transfer fees," she paid in Germany a sum of RM. 11,039.24, of which RM. 9493.75 represented L.P. 775 at the then rate of exchange of RM. 12.25 to L.P. 1, and the balance of RM. 1545.49 the fees which she had agreed to pay, and by the further fact that on the footing that she had been overcharged in respect of those fees "Haavara" credited the respondent company and the respondent company in turn credited her with a certain sum of RM. which was satisfied by the allotment to her of thirty-eight ordinary shares of the company. In considering the question, to which they must shortly come, whether the appellant is entitled to recover from the respondent company the money paid by her for the preference shares on the footing of a total failure of consideration, their Lordships are content to ignore, and treat as the outcome of a separate transaction, the receipt by her of the thirty-eight ordinary shares.

The appellant held her shares for four years and then sold her seven hundred and seventy-five preference shares and also her ordinary shares, of which she had increased her holding to fifty, through the Holland Bank Union for L.P. 116.250 and L.P. 3.750 respectively. The transaction is somewhat obscure, but it is not in doubt that she executed transfers in blank which were ultimately on September 28, 1941, completed as to the preference shares in favour of the Palestine Independent Trust Association, Ld., and as to the ordinary shares in favour of one Bromberger, and that these transfers were duly registered with the respondent company and the old certificates cancelled and new ones issued and the transferees placed on the register of members of the company in place of the appellant. It has not been suggested that at this time any doubt had arisen in the mind of the appellant as to the validity of the issue of preference shares, but in the same year another original allottee of such shares commenced an action against the company and certain of its directors claiming repayment of the money paid by her for such shares on the ground (to put it shortly) that they had not been validly issued. And in these proceedings on February 18, 1943, an order was made confirming terms of compromise by which (inter alia) the company admitted that the resolution of April 12, 1935, was not properly passed and that the allotment of preference shares to the plaintiff in those proceedings was void. Shortly thereafter the respondent company circularized the then registered holders of preference shares offering to repay them the amounts paid by them for their shares. No similar offer having been made to the appellant, who had previously disposed of her shares, on March 28, 1943, her advisers wrote to the company demanding repayment of the sums paid by her for her seven hundred and seventy-five preference shares and stating that she withdrew her application for preference shares as there had been a delay for nearly eight years, and that she would repudiate any allotment of shares the company might be advised to make in the future. At the same time they wrote a letter to the Holland Bank Union (to which, since learned counsel for the appellant relies on it, it is proper to refer) enclosing a copy of their letter to the company and saying " Now we wish to make it clear that our " client does not desire to collect from the company the " amount due to her from it and at the same time to retain the " sum she received from you in 1939." It cannot, however, fail to be observed that there is an implication that, if for any reason the appellant cannot recover from the company, she will not relinquish the money received from the bank.

The company having refused to accede to the appellant's demand, she brought the action out of which this appeal arises. By it she claimed a refund of the sum paid by her for the seven hundred and seventy-five preference shares, alleging that she " did not receive the consideration which she bargained for or " any consideration." Her action in simplest terms was for money had and received on a total failure of consideration, and it was frankly admitted by her learned counsel on this appeal that, if she could not sustain that plea, her action was rightly dismissed and this appeal must fail. The question, then, is whether there was a total failure of consideration moving from the respondent company. Their Lordships would at once dismiss as irrelevant to the determination of this question the fact that the appellant spontaneously offered in a certain event to refund to the bank the money she had received

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on the sale of her shares. Equally irrelevant is the fact that she obtained substantially less than she had paid for her shares. Her rights against the company must be the same whether she sold them at their par value or for more or less. Their Lordships agree with the learned judges of the Supreme Court in thinking that the relevant plea can by no means be sustained. It appears to them that, having been duly registered as a shareholder and having parted for value with her shares by a sale which the company recognized by issue of a share certificate to, and registration of, her transferee, she got exactly that which she bargained to get. Whether that transferee, finding that the shares had not been validly issued, would have any claim against her is a question which does not fall to be determined. But it appears to their Lordships to be idle to suggest that one who has parted with her shares for value can at a later date (it may be against the wish and against the interest of her transferee) challenge the validity of the issue and, succeeding in that challenge, then claim that she received something of no value and that there was a total failure of consideration. On the contrary, whether the issue was valid or invalid, a matter no longer important to her but vitally important to her transferee, she received something from the company which was worth to her just what she got for it. Their Lordships do not question the general proposition that, where an ultra vires issue of shares has been made, the subscribers are entitled to recover their money, but this does not justify the claim of one, who has sold her shares, at a later date to assert that they have not been lawfully issued, much less to assert, contrary to the plain fact, that there has been, so far as she was concerned, a total failure of consideration. Learned counsel for the appellant relied on the authority of *Rowland* v. *Divall* (1). That case might have assisted him, if the fact was that the appellant still held the shares, even though she had received a dividend on them. On this their Lordships express no opinion. But it does not avail him in a case where the shareholder has sold his shares.

For these reasons it is unnecessary to investigate the question whether or not the issue was for any reason invalid—a question, indeed, which it would, as their Lordships think, in any case be improper to discuss in the absence of the transferee, the party truly interested. On the broad ground that the appellant has

(1) [1923] 2 K. B. 500.

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failed to sustain the plea of total failure of consideration, their Lordships are of opinion that this appeal should be dismissed, with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Hardman, Phillips & Mann.*
Solicitors for respondent: *Herbert Oppenheimer & Co.*

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[PRIVY COUNCIL]

BANK OF CHETTINAD, LIMITED, OF COLOMBO . . . . . Appellant;

and

COMMISSIONER OF INCOME TAX, COLOMBO . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon — Revenue — Income tax — Banking — " Ceylon branch " of non-resident company—Interest on balances due to head office—Deduction—Income Tax Ordinance, No. 2 of 1932, *ss.* 2, 35, 90—*Income Tax Rules, r.* 1.

In r. 1 of the Income Tax Rules (made under s. 90 of the Income Tax Ordinance, 1932, of Ceylon), which deals with the method of ascertainment and determination of the profits of Ceylon branches of non-resident bankers, and provides, inter alia, that " ' Ceylon " ' branch ' means the business carried on in Ceylon by any such " bank," the words " of banking " must be implied after the word " business " in the rule. The proper test for determining whether the Ceylon branch of a company claiming to be a non-resident banker within the meaning of r. 1 carried on the " business of " banking " at the material time was to consider whether that branch, at that time, could fairly be described [in the words of s. 330 of the Companies Ordinance, 1938, of Ceylon, which afforded a valuable guide to the meaning of " business of banking " in the Ordinance of 1932] as " a company which carries on as its principal " business the accepting of deposits of money on current account " or otherwise, subject to withdrawal by cheque, draft or order."

Judgment of the Supreme Court of the Island of Ceylon (1946) 47 N. L. R. 25, affirmed.

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* *Present:* Lord Simonds, Lord Morton of Henryton and Sir Madhavan Nair.

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Bank of Chettinad, Ld. of Colombo v. Commissioner of Income Tax, Colombo.

Appeal (No. 77 of 1946) from a judgment and decree of the Supreme Court of the Island of Ceylon (January 17, 1946) whereby it was held on a Case Stated by the Income Tax Board of Review, Colombo, reversing the decision of the Board, that the appellant was not entitled to have allowed as a deduction for income tax purposes in respect of the year ending March 31, 1940, the sum of Rs. 53,226 paid by their Ceylon branch by way of interest to their head office in Rangoon.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. This appeal was concerned with the amount at which the appellant company (hereafter called " the company ") was liable to be assessed to income tax, under the Income Tax Ordinance of Ceylon, in respect of the income and profits of its Ceylon branch, conducted at an office in Colombo. The question for decision was whether, in computing the amount of the said income and profits, a deduction should be allowed in respect of a sum of Rs. 53,226, debited to the Ceylon branch by way of interest on balances due to the head office during the year ending March 31, 1940. The answer to that question depended on the construction of rules made under the said Ordinance dealing especially with the taxation of the Ceylon branch of a non-resident bank, and on the application of those rules to the facts of the case. It was not disputed that, apart from those rules, the deduction claimed was inadmissible, inasmuch as debits and credits as between a head office and the branches of a company were not expenses or receipts which came into account in computing the profits of the business of a branch.

The relevant portions of the Income Tax Ordinance, No. 2 of 1932, and of the rules made thereunder may be summarized as follows: In s. 2 of the Ordinance, which contained definitions, it was provided that—" ' banker ' means any company or body " of persons carrying on the business of banking." By s. 35 of the Ordinance it was provided that a non-resident person should be assessable either directly or in the name of his agent, in respect of all his profits and income arising in or derived from Ceylon. Section 90 empowered the Board of Income Tax to make rules (inter alia) for the ascertainment or determination of any class of income, and in particular to prescribe the manner in which, and the procedure by which, the income, profits and gains should be arrived at in the case of non-resident companies.

Rules had been made under s. 90 of the Ordinance with

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regard to the method of ascertainment and determination of the profits of Ceylon branches of non-resident bankers. Rule 1 was as follows: "In this rule, unless the context otherwise "requires:

"'bank' means any non-resident banker within the "meaning of these expressions, as defined in section 2 of "Ordinance No. 2 of 1932.

"'Ceylon branch' means the business carried on in Ceylon "by any such bank.

"'other branch' means the business carried on by a bank "in any country outside Ceylon, including that carried on "at its principal place of business."

The rules provided for a deduction for interest where the Ceylon branch of a non-resident bank owed an average amount in an accounting period to other branches. Under s. 330 of the Companies Ordinance, No. 51 of 1938, a "banking company" was defined to mean "a company which carries on as its principal "business the accepting of deposits of money on current "account or otherwise, subject to withdrawal by cheque, draft "or order, notwithstanding that it engages in addition in any "one or more of the following forms of business," which were then specified.

The company at the material time had its head office in Rangoon and a branch in Ceylon. It was common ground that the company was at that time a non-resident person, and that it carried on some business in Ceylon through its Ceylon branch. In the course of carrying on its business in Ceylon, the Ceylon branch credited a sum of Rs. 53,226 to the head office in Rangoon by way of interest for the year ending on March 31, 1940. It was claimed by the company that that sum should be allowed as a deduction, under the rules, in assessing the company in respect of the profits of the Ceylon branch for the year of assessment ending on March 31, 1941. The assessor having disallowed that claim, the company appealed to the respondent, who dismissed the appeal and confirmed the assessment, subject to an agreed deduction on other grounds. In his determination, the respondent referred to the definition of a banking company contained in the Companies Ordinance, and took the view that the company did not come within that definition.

The company appealed to the Board of Review. That Board allowed the appeal and held that the company was entitled to the deduction claimed. The Board considered that the definition of "banking company" in the Companies Ordinance was not relevant to the construction of the Income Tax Ordinance. The respondent required the Board of Review to state a case on a question of law for the opinion of the Supreme Court, pursuant to s. 74, sub-s. 1, of the Income Tax Ordinance, and a case was stated accordingly by the said Board. The following passages are quoted from the case stated. " At the hearing " before the Commissioner it was not disputed that the Ceylon " branch had been mainly carrying on the business of lending " money on promissory notes or on the mortgage of immovable " property in Ceylon and the management of estates and house " properties owned by the Bank in Ceylon. The exhibit A (3.) " showed that the only current and deposit accounts with the " local branch were those of the Chettinad Corporation, Limited, " and seven other persons. These seven persons were stated " to have closed their accounts during the year ending March 31, " 1940 ; thus the only current and deposit accounts as at that " date were those of the Chettinad Corporation, Limited, and " these showed a debit balance as at that date. That the " branch was financed mainly from its Head Office in Rangoon " appeared from the books. The profit and loss account showed " a sum of Rs. 81,792 payble as interest by the local branch " to the Head Office. No cheque books have been issued by " the Bank and no evidence was placed before the Com- " missioner that any moneys in deposit could have been with- " drawn by cheque, draft or order."

No evidence was given by the company as to the amounts deposited by the above-mentioned seven persons, or as to the method by which those amounts were withdrawn. Other exhibits annexed to the case stated showed that the Chettinad Corporation and the company were closely connected. Five individuals who held 99 per cent. of the issued capital of the Chettinad Corporation also held 95 per cent. of the issued capital of the company. The conclusions of the Board of Review were set out in para. 9 of the case stated, as follows : " (A) The " Bank of Chettinad, Limited, was at the material dates a " ' non-resident banker ' within the meaning of Rule 1 of the " Rules made under s. 90 of the Ordinance, in that it carried on " the business of a banker at its Head Office in Rangoon ; " (B) The Ceylon Branch also carried on the business of a " banker, on the facts before the Board ; (C) It is not necessary " —in order to be entitled to the deduction claimed—that the " business in Ceylon of the non-resident banker should be " banking business.

" If conclusion (A) is erroneous then the deduction would " have to be disallowed whether or not conclusions (B) and/or " (C) are correct. If conclusion (A) is correct then the " deduction would have to be allowed in the event of either " conclusion (B) or conclusion (C) being also held to be correct ; " but if (A) is correct and both (B) and (C) are incorrect then " the deduction should be disallowed."

On January 17, 1946, the Supreme Court (Soertsz Ag. C.J. and Rose J.) delivered judgment setting aside the order of the Board of Review and declaring that the company was not entitled to the relief claimed. From that decision the company appealed.

1948. Feb. 25, 26. *Cyril King K.C.* and *Stephen Chapman* for the appellant.

Sir David Maxwell Fyfe K.C. and *R. P. Hills* for the respondent.

April 6. The judgment of their Lordships was delivered by Lord Morton of Henryton, who stated the facts set out above and continued : It is convenient first to consider the Board's conclusion (C), and their Lordships feel no doubt that in arriving at this conclusion the Board of Review misconstrued the relevant statutory provisions. It is true that r. 1, in defining " Ceylon branch," refers to " the business carried on in Ceylon " by any such bank " and does not contain the words " of " banking " after " business," but their Lordships think that these words must be implied. In their Lordships' view the rule-making authority must have contemplated that the business carried on by a bank at its branches would be banking business, and it was thought unnecessary to state this in terms. It is hardly to be supposed that if a non-resident bank chose to open and finance, for instance, a confectioner's business in Ceylon the deduction in question would be allowed in respect of such business. It would appear that no very strenuous effort was made in the Supreme Court to support conclusion (C), but as the point was not definitely abandoned their Lordships have allowed it to be raised before this Board.

As to conclusion (B), counsel for the company argued that this was a finding of fact in his favour by the tribunal entrusted with the duty of finding the facts. In their Lordships' view, however, the question whether the Ceylon branch carried on the business of banking at the relevant time is a question of mixed fact and law, involving the construction of the Ordinance and rules. In a very clear and careful discussion of this question, the Board of Review referred to a number of authorities on the meaning of the words "banking" and "banker." Their Lordships recognize that these words may bear different shades of meaning at different periods of history, and that their meaning may not be uniform to-day in countries of different habits of life and different degrees of civilization. For the purpose of this appeal, however, it is only necessary to ascertain what is meant by the words "business of banking" in an Ordinance applicable to Ceylon, which came into force in 1932. In their Lordships' view a valuable guide to the meaning of these words is afforded by s. 330 of the Companies Ordinance of 1938. In the Supreme Court, Rose J., delivering a judgment with which the Acting Chief Justice agreed, held that s. 330, although it came into force six years later than the Ordinance of 1932, "merely crystallized what was already the "legal conception of a 'bank' in Ceylon" (1). Moreover, the definition in s. 330 in no way conflicts with the meaning attached to the word "banker" in England in 1932, and if s. 330 were to be entirely disregarded, it would be necessary to bear in mind the terms of s. 3 of the Civil Law Ordinance, 1853 (Cap. 66 of the Legislative Enactments of Ceylon) which provides as follows: "In all questions or issues which may hereafter arise "or which may have to be decided in this Island with respect "to the law of partnerships, joint stock companies, corporations, banks and banking, principals and agents, carriers by "land, life and fire insurance, the law to be administered "shall be the same as would be administered in England in the "like case, at the corresponding period, if such question or "issue had arisen or had to be decided in England, unless in "any case other provision is or shall be made by any Ordinance "now in force in this Island or hereafter to be enacted."

Their Lordships think that the proper test for determining whether the Ceylon branch carried on the business of banking at the material time is to consider whether that branch, at that time, could fairly be described as "a company which carries "on as its principal business the accepting of deposits of money "on current account or otherwise, subject to withdrawal by "cheque, draft or order." If this test is applied to the facts of the present case it becomes clear that there was no evidence on which the Board of Review could properly find that the

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(1) (1946) 47 N. L. R. 28, 29.

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Ceylon branch answered that description. The passage quoted above from the case stated shows that the evidence was wholly inconsistent with any such finding. The accepting of deposits of money was clearly not the principal business of the Ceylon branch, and there was no evidence that any moneys on deposit could have been withdrawn by cheque, draft or order. The Board of Review could not have arrived at conclusion (B) if its members had correctly interpreted the Ordinance and rules, and the Supreme Court rightly rejected that conclusion. As conclusions (B) and (C) are incorrect, the deduction claimed by the company must be disallowed and it is unnecessary to consider whether conclusion (A) is or is not correct. But their Lordships see no reason to differ from the observation of Rose J. that the company might well experience difficulty in establishing that its head office in Rangoon was carrying on a banking business, within the meaning of the Ceylon Ordinance (1).

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The company must pay the respondent's costs of this appeal.

Solicitors for appellant: *Darley, Cumberland & Co.*
Solicitors for respondent: *Burchells.*

(1) 47 N. L. R. 28, 29.

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Feb. 19, 20, 23, 24, 26;
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[HOUSE OF LORDS]

ILLSTON & ROBSON, LIMITED . . APPELLANTS;

AND

SMITH . . . . RESPONDENT.

Workmen's compensation—Injury by accident—Partial incapacity—Diminution of earnings—Economic change in industry—Weekly payments—Calculation—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1; *s.* 9, *sub-s.* 3 (i.).

By s. 9, sub-s. 3 (i.) of the Workmen's Compensation Act, 1925: " . . . . the weekly payment in case of partial incapacity shall be

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* *Present:* LORD THANKERTON, LORD PORTER, LORD UTHWATT, LORD DU PARCQ and LORD OAKSEY.

"one-half the difference between the amount of the average weekly "earnings of the workman before the accident and the average "weekly amount which he is earning or is able to earn in some "suitable employment or business after the accident."

A capstan tool setter who in July, 1945, suffered an accident arising out of and in the course of his employment, in consequence of which he lost a finger, returned to his former work in September, 1945, suffering partial incapacity both for work in the open labour market and for his pre-accident work. His average weekly earnings were 9*l.* 16*s.* 11*d.* a week before the accident and 8*l.* 12*s.* 3*d.* a week after it. The difference of 1*l.* 4*s.* 8*d.* was due partly to his injury and partly to industrial conditions.

Held that he was entitled to receive as compensation weekly payments amounting to one-half of that difference.

Where it is found that, by reason and as the result of his injury, the workman is partially incapacitated for work in the open labour market and for his pre-accident work, the arbitrator under the Act is bound to accept his actual earnings as the second factor in arriving at the difference referred to in s. 9, sub-s. 3, and he is not entitled to inquire into any economic changes arising since the accident.

Delta Mill (1919), *Ld.* v. *Blakemore* (1935) 104 L. J. (K. B.) 459 applied.

Jones v. *Amalgamated Anthracite Collieries, Ld.* [1944] A. C. 14 distinguished, on the ground that there the workman's inability to earn more than his army pay as a conscripted soldier had no connexion with his accident,

Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal (Scott, Morton and Somervell L.JJ.).

The facts, stated by LORD THANKERTON, were as follows: The respondent, who had been employed by the appellants for a number of years as a capstan tool setter, was injured in his right ring finger by an accident, which admittedly arose out of and in the course of his employment. As a result of the accident, the respondent's right ring finger was amputated through the proximal joint on July 9, 1945. The respondent started work again on September 10, 1945, at his old work as a capstan tool setter for the appellants, and at all material times had continued at that work. On April 24, 1946, he claimed compensation under the Workmen's Compensation Acts, 1925–1943. The learned arbitrator, His Honour Judge Tucker, sitting in the Birmingham county court, accepted the respondent's evidence that, as the result of the injury, he was not able to supervise so many operators as formerly, and was therefore unable to earn so much money as before, he being

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only able to supervise at most five operators instead of eight, which made a difference of 1*l.* The arbitrator found that, "by reason of, and as a result of the injury sustained by the "applicant, he was partially incapacitated for work in the "open labour market and for his pre-accident work of a "capstan setter." The respondent's pre-accident earnings, as revised under s. 6 of the Act of 1943, were 9*l.* 16*s.* 11*d.* per week, and his post-accident earnings were 8*l.* 12*s.* 3*d.* down to the date of the hearing of the arbitration, the difference amounting to 1*l.* 4*d.* 8*d.* In view of the contentions of the appellants and to facilitate their being again raised on an appeal, the arbitrator made findings that one-third of this difference was due to the respondent's incapacity for work, resulting from the injury, and that two-thirds was due to industrial conditions and the change-over from war to peace. However, on consideration of certain authorities, he rejected the appellants' contentions, and awarded the respondent 12*s.* 4*d.* per week, being one-half of the said difference. with appropriate supplementary allowances, in respect of partial incapacity. The award was made on July 23, 1946, and was to apply from February 3, 1946. On an appeal by the appellants, this award was affirmed by the Court of Appeal by an order dated February 26, 1947. They then appealed to the House of Lords.

Beney K.C. and *Colin Coley* for the appellants. Under s. 9, sub-ss. 1 and 3 of the Workmen's Compensation Act, 1925, a partially incapacitated workman is not entitled to one-half the difference between his pre-accident average weekly earnings and his post-accident average weekly earnings where an ascertained part of that difference is shown to be due solely to general economic conditions, the change-over from war-time to peace-time working or some other cause not connected with the injury by accident. On the facts found in the present case, the compensation to be awarded to the respondent is not to be assessed at one-half the full difference between his pre-accident and post-accident earnings. He has so far recovered as to be able to do his pre-accident work and he is doing it but he is earning less than his pre-accident wages, the difference in his wages being as regards two-thirds thereof in no way due to his injury. Accordingly, he is entitled to be compensated, not in respect of the whole difference in wages, but only in respect of one-third which is due to the incapacity. *Jones* v. *Amalgamated*

Anthracite Collieries, Ld. (1) covers this case and establishes that the difference between pre-accident earnings and present actual earnings is irrecoverable save in so far as the loss is attributable to the accident and not to outside circumstances. It must be shown that the difference "results from the "injury": see s. 9, sub-s. 1 of the Act. *Delta Mill* (1919), *Ld.* v. *Blakemore* (2), which might seem to lead to a different conclusion, is distinguishable; if that conclusion were to be drawn, it would not be consistent with *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (1). Admittedly *Delta Mill* (1919), *Ld.* v. *Blakemore* (2) establishes that if the workman is in fact earning, it is the amount he is earning that must be looked at and not what he is able to earn, but in construing the words "is earning" one must imply the addition of the words "solely "as a result of the accident." The arbitrator must consider whether the amount earned truly reflects the figure which results from the injury or whether it is quite unconnected with the injury. He must inquire how much of the reduction is due to the relevant factor of incapacity from the injury. There must be a comparison between the economic conditions before the accident and those which affect his earnings after it. Admittedly, where a workman, who has been injured, is forced to leave one occupation and to take up another type of work which suffers a reduction in wages he is entitled to increased compensation and the tribunal cannot inquire what his earnings in his original occupation would have been; but where he remains in his old occupation and earns less, partly because his working capacity is slower and partly by reason of economic conditions, he is only entitled to be compensated for loss arising from the former cause, since the compensation is a replacement of what he has in fact lost by the accident and to give him more would be to compensate him, not for loss of earning power, but for accidental and irrelevant economic conditions. Thus a man working an eight-hour day at 2*s*. 6*d*. an hour for a forty-four-hour week would earn 1*l*. a day and 5*l*. 10*s*. a week and, if his pace were reduced by one-eighth, he would earn 17*s*. 6*d*. a day and 4*l*. 16*s*. 3*d*. a week, assuming a corresponding reduction in his rate of wages, so that his compensation would be based on a reduction of 13*s*. 9*d*. But if the rate of wages went down to 2*s*. an hour the workman of full capacity would earn 16*s*. a day and 4*l*. 8*s*. a week, while the injured man would earn 14*s*. a day and 3*l*. 17*s*. a week. Accord-

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(1) [1944] A. C. 14.

(2) (1935) 104 L. J. (K. B.) 459.

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ingly, his actual loss would be 11*s*. and not 13*s*. 9*d*. To give him half the difference between what he earned before the accident and what he was earning in the present would give him an unfair advantage over other workmen. In some cases the principle might lead to his receiving more than an uninjured man. Thus, if the full wage were originally 6*l*. a week and that earned by the man after his injury was 4*l*. but, from economic causes, the full wage dropped to 4*l*. for an uninjured man and 3*l*. for the injured man then, on the respondent's principle, he would receive 3*l*. wages and 1*l*. 10*s*. compensation, i.e., more than the uninjured man. This cannot have been the legislature's intention. Compensation must be limited to the actual loss suffered as a result of the injury. But if the causal factor of incapacity resulting from the injury is operating so as to be a factor producing those earnings, then the fact that there is also an extraneous factor operating, producing the same result, is irrelevant. The case should go back to the arbitrator to assess the compensation by awarding half the difference between the respondent's pre-accident earnings and the amount which but for the extraneous factors mentioned in his judgment, the respondent would have been able to earn after the accident. *Sharplin* v. *W. B. Bawn & Co., Ld.* (1) should not be upheld. [They referred to *Cardiff Corporation* v. *Hall* (2); *Ball* v. *William Hunt & Sons, Ld.* (3); *Bevan* v. *Nixon's Navigation Co., Ld.* (4); *Heathcote* v. *Haunchwood Collieries, Ld.* (5); *Merry & Cunninghame, Ld.* v. *Black* (6); *Bromley* v. *Staveley Iron & Coal Co., Ld.* (7); *Lewis* v. *Guest, Keen & Nettlefolds, Ld.* (8); *Lyon* v. *Taylor Brothers* (9); *Dykes* v. *William Baird & Co., Ld.* (10); *White* v. *L. & N.E. Ry. Co.* (11); *Portland Colliery Co., Ld.* v. *Murray* (12); *Matthews* v. *Harland & Wolff, Ld.* (13); *Hunnisett* v. *Southend Corporation* (14); *Bevan* v. *Energlyn Colliery Co.* (15); and *Heaney* v. *B. A. Collieries, Ld.* (16).]

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(1) (1947) 63 T. L. R. 217; 40 B. W. C. C. 67.

(2) [1911] 1 K. B. 1009.

(3) [1911] 1 K. B. 1048.

(4) [1929] A. C. 44.

(5) [1918] A. C. 52.

(6) 1909 S. C. 1150; 2 B. W. C. C. 372.

(7) (1923) 129 L. T. 620; 16 B. W. C. C. 77.

(8) [1928] 1 K. B. 20.

(9) (1928) 21 B. W. C. C. 415.

(10) 1929 S. C. 555; 22 B. W. C. C. 792.

(11) [1931] A. C. 52.

(12) [1923] A. C. 566.

(13) (1932) 102 L. J. (K. B.) 170; 25 B. W. C. C. 533.

(14) (1940) 33 B. W. C. C. 50.

(15) [1912] 1 K. B. 63.

(16) (1944) 113 L. J. (K. B.) 573; 37 B. W. C. C. 39.

Paull K.C. and *R. M. Everett* for the respondent. In a case such as this the arbitrator, before he starts assessing compensation must be satisfied that " total or partial incapacity " for work results from the injury " : see s. 9, sub-s. 1, of the Act of 1925. If there is partial incapacity he must look at s. 9, sub-s. 3, for " the rules for calculating the weekly payment " in the case of partial incapacity." Under s. 9, sub-s. 3 (i.) one of the crucial factors is the amount which the man " is " earning or is able to earn " in the open labour market, not what he would be able to earn in other and different circumstances. The position was different under the earlier Acts which left the consideration of the factor of the difference in earning power in the arbitrator's discretion : see Workmen's Compensation Act, 1897, sch. I., para. 1 (*b*) and para. 2 which lays down that " regard shall be had to the difference between " the amount of the average weekly earnings of the workman " before the accident and the average amount which he is " able to earn after the accident." The Workmen's Compensation Act, 1906, sch. I., para. 3 is in substantially the same terms. This is reflected in sch. I., para. 12 of the Act of 1897 and sch. I., para. 16 of the Act of 1906 dealing with the question of review : see also *Bevan* v. *Energlyn Colliery Co.* (1) and *Heathcote* v. *Haunchwood Collieries, Ld.* (2). The Acts of 1923 and 1925 did away with the discretion of the arbitrator. In consequence s. 11, sub-s. 3, of the Act of 1925, dealing with the review of weekly payments, was introduced, whereas if the contentions of the appellants were right there would have been no need for it : see *Hill* v. *Wolverhampton Corrugated Iron Co. Ld.* (3). Under s. 9, sub-s. 3 (i.) of the Act of 1925 the arbitrator must (i.) find whether the workman is suffering from incapacity for work in the open labour market ; (ii.) if so, find his pre-accident earnings ; (iii.) if the man is earning, take a fixed proportion of the difference between his pre-accident and his post-accident earnings unless (*a*) any part of the difference is due to a deliberate wage-reducing act on the man's part or (*b*) any part of the difference is due to a supervening event not connected with his work or with the general industrial or economic conditions of the labour market ; (iv.) if the man is not earning or if the exceptions apply, then the arbitrator must take the figure of what he is able to earn, disregarding any supervening event not connected with his work or with the

(1) [1912] 1 K. B. 63, 67.
(2) [1918] A. C. 52.
(3) [1929] 2 K. B. 469.

general industrial or economic conditions of the labour market. This case is covered by the decision in *Delta Mill (1919), Ld.* v. *Blakemore* (1) and there is nothing to distinguish it. The principle laid down in *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (2) does not apply where the workman is earning wages in the open labour market. In that case the supervening event of conscription occurred and had to be disregarded. The words " is earning " refer to earning in the open labour market. If the man is in fact earning, the only way in which his actual weekly wages can be displaced is by showing that something has occurred to take him out of the industrial labour market. Even if the man is doing the same work as he was doing before the accident and is earning as much as his fellow workmen who are doing that work those facts are both immaterial, once incapacity and a diminution of his pre-accident earnings are proved. [They referred to *M'Cann* v. *Scottish Laundry Association, Ld.* (3); *Portland Colliery Co., Ld.* v. *Murray* (4); *Heaney* v. *B. A. Collieries, Ld.* (5); *Dykes* v. *William Baird & Co., Ld.* (6); *White* v. *L. N. E. Ry. Co.* (7) and Workmen's Compensation Act, 1943, s. 6.]

Beney K.C. in reply. In the third of the rules suggested by the respondents for ascertaining the amount of the weekly payments the exceptions are unsatisfactory because they do not rest on the clear language of the Act. The safer course is to consider the matter and wording of s. 9 itself. A workman is only entitled to receive increased compensation in respect of changes due to economic circumstances when a necessary causal factor in his loss is that he is put into a category of work subject to fluctuations to which but for his injury he would not have been exposed. [He referred to *White* v. *L. & N.E. Ry. Co.* (8); *John Watson, Ld.* v. *Quinn* (9); *William Dixon, Ld.* v. *Madden* (10) and *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (11).]

THE HOUSE took time for consideration.

April 30. LORD THANKERTON. My Lords, it is hardly necessary to remind your Lordships that the right to compensation is conferred by s. 1, sub-s. 1, of the Workmen's Compenstion Act, 1925, and that the amount of compensation, in the case of partial incapacity, is to be measured by the provisions of sub-ss. 1 and 3 of s. 9, the relevant provisions of which are as follows: "(1.) The compensation under this "Act where total or partial incapacity for work results from "the injury shall be a weekly payment during the incapacity "of an amount calculated in accordance with the rules herein-"after contained: . . . . (3.) The rules for calculating the "weekly payment in the case of partial incapacity shall be— "(i.) If the maximum weekly payment would, had the in-"capacity been total incapacity, have amounted to twenty-"five shillings a week or upwards, the weekly payment in "case of partial incapacity shall be one-half the difference "between the amount of the average weekly earnings of the "workman before the accident and the average weekly amount "which he is earning or is able to earn in some suitable employ-"ment or business after the accident."

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(1) 104 L. J. (K. B.) 459.
(2) [1944] A. C. 14.
(3) 1936 S. C. (H. L.) 12.
(4) [1923] A. C. 566.
(5) 113 L. J. (K. B.) 573; 37 B. W. C. C. 39.
(6) 1929 S. C. 555; 22 B. W. C. C. 792.
(7) [1931] A. C. 52, 65.
(8) Ibid. 52, 60.
(9) 1923 S. C. 6.; 15 B. W. C. C. 327.
(10) [1923] A. C. 566.
(11) [1944] A. C. 14, 21, 23.

My Lords, we had a long citation of decisions in this House and in the Court of Appeal and the Court of Session, but I do not think that I am incorrect in stating that the appellants' contentions were solely based on the decision of this House in the recent case of *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (1) which they sought to distinguish from the decision of this House in *Delta Mill* (1919), *Ld.* v. *Blakemore* (2). The appellants' contention is that the difference between the pre-accident earnings and the workman's present actual earnings must be shown to "result from the injury," and that, in the present case, the arbitrator has found that to the extent of two-thirds they do not so result. In my opinion, this contention is based on a misunderstanding, or misconstruction, of sub-s. 3 of s. 9 of the Act of 1925.

I will refer first to *Delta Mill* (1919), *Ld.* v. *Blakemore* (2), in which the respondent, who had been a cotton spinner in the employ of the appellants, was admittedly partially incapacitated and entitled to compensation under the Workmen's Compensation Acts, provided he could prove a weekly amount due as calculated under s. 9, and, in particular, sub-s. 3. The only alternative employment he had been able to get was as a bookmaker's clerk, the employment being seasonal and part-time. It was clearly held—not necessarily for the first time—that the words "is earning or is able to earn" provide two

(1) [1944] A. C. 14.

(2) 104 L. J. (K. B.) 459.

distinct alternatives, and that the words "in some suitable "employment or business" do not qualify the first alternative, and also that there was no justification for confining the first alternative to full-time employment. I venture to quote from my speech, which was concurred in by both my noble and learned colleagues. After noting (1) that, in contrast with the Workmen's Compensation Act, 1906, a fixed amount of one-half of the difference between the two factors is substituted by the Acts of 1923 and 1925 for the discretion permitted to the arbitrator, I proceed to say (2): "The appellants maintain that "the words 'is earning or is able to earn' do not express true "alternatives, but are conjunctive, and that, accordingly "(*a*) the arbitrator was not bound in law to hold that what the "respondent was 'able to earn' was necessarily the amount "he was in fact actually earning, and (*b*) that the arbitrator "was justified in finding that the part-time wages earned by "the respondent were no criterion of what the respondent was "able to earn. It appears clear to me that the first of these "contentions is not conditioned by the fact of part-time "employment, but that, if sound, it must equally apply where, "though the workman is employed on a whole-time basis, the "amount of work available in that employment is affected by "conditions not personal to the workman, for example, of the "labour market." Later, I say: "The words clearly express "alternative methods of assessing the value of the post-accident "capacity for work, and these alternative methods will apply "according as the workman is in fact then employed or is "unemployed. If the appellants' first contention were sound, "there was no need for the insertion of the first alternative, "and the actual earnings of the workman would not be the "criterion of his earning power, but only an item of evidence— "more or less useful—to enable the arbitrator to arrive at what "he was 'able to earn'." And again: "In my opinion, the "Act provides a simple method, though it may not be a "logical one, as the actual earnings of the workman are "presumably conditioned by the existing economic position "of the labour market—an element which falls to be excluded "in assessing the amount which he is 'able to earn'." I then refer to the qualification that the workman's actual earnings must be the result of a bona fide effort to get work suitable to his then condition, and to Lord Dunedin's well known dictum in *Heathcote* v. *Haunchwood Collieries, Ld.* (3). But this

(1) 104 L. J. (K. B.) 459, 464.
(2) Ibid. 465.
(3) [1918] A. C. 52, 56.

qualification is not available in the present case, since it rests on a comparison of what the workman is earning under existing economic conditions with what he could earn under the same existing conditions, whereas the present appellants' contention rests on a comparison of what the workman is earning under existing economic conditions with the economic conditions which affected his pre-accident earnings. That comparison seems to me to be clearly irrelevant to what he is actually earning at present, although that comparison of economic conditions at the material times may be relevant to a review of the other factor, the pre-accident earnings, under s. 6 of the Workmen's Compensation Act, 1943. Similarly, any comparison of existing conditions with any post-accident economic conditions at any earlier date would be equally irrelevant. I may add that, in my opinion, the decision in *Lyon* v. *Taylor Brothers* (1), already moribund, was finally overruled by the decision in *Blakemore's* case (2).

In my opinion, the appellants' contention is excluded by the decision in *Delta Mill* (1919), *Ld.* v. *Blakemore* (2). The learned arbitrator having found that the respondent was partially incapacitated, by reason of, and as a result of the injury sustained by him, for work in the open labour market and for his pre-accident work of a capstan tool setter was bound by the statute to accept his actual earnings as forming the second factor in arriving at the difference referred to in sub-s. 3 of s. 9, and he was not entitled to inquire into any economic changes arising since the accident.

It remains to consider whether the decision in *Jones's* case (3) is of any assistance to the appellants. Jones, who had been employed by the respondents as a collier before the accident, admittedly suffered an injury arising out of and in the course of his employment. As the result of the accident he was paid as for total incapacity for about three years, when he began work above ground, and then received compensation as for partial incapacity, based on the difference between his pre-accident earnings of 2*l.* 10*s.* 8*d.* a week and his earnings above ground, until November, 1937, when the latter earnings became as much as, or more than, his pre-accident earnings, and compensation therefore ceased. While he was actually earning 3*l.* 15*s.* 4*d.*, he was called up on September 30, 1940, for service in the army under the National Service (Armed

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(1) 21 B. W. C. C. 415.
(2) 104 L. J. (K. B.) 459.
(3) [1944] A. C. 14.

Forces) Act, 1939, his pay and allowances amounting to 2*l*. 0*s*. 9*d*. per week. In May, 1942, he applied under s. 9, sub-s. 3 (i.) of the Act of 1925, for compensation, on the footing that his actual earnings were 2*l*. 0*s*. 9*d*. per week, and that he was entitled to one-half the difference between that figure and his pre-accident earnings, which came to 4*s*. 11½*d*. per week. The arbitrator found that he was still partially incapacitated for work as the result of the accident, that he was not fit for his pre-accident work as a collier, but was fit for light work, at which he could earn a wage of 3*l*. 15*s*. 4*d*. The learned arbitrator added this important finding: "The "cause of his inability to earn 3*l*. 15*s*. 4*d*. is due, not to any "physical incapacity, but solely to his conscription under the "1939 Act." He awarded the compensation claimed, but his decision was reversed by the Court of Appeal, whose decision was affirmed by this House. Following the decision in *"Raphael" S.S. (Owners)* v. *Brandy* (1), it was held by this House that Jones's military pay and allowances were "earnings" within the meaning of the Workmen's Compensation Acts, but it was held that the reduced earnings of the workman in an employment which is in no way connected with his partial incapacity or the injury resulting from the accident are not a proper factor to be taken into account as being what "he is earning" for the purpose of calculation of weekly compensation due in respect of partial incapacity resulting from the injury. It is clear that Jones's employment in the army and his earnings in respect thereof arose regardless of his partial incapacity. As my noble and learned friend Lord du Parcq, then in the Court of Appeal, stated (2): "The principle, then, appears "to me to be that the words 'which he is earning' refer only "to earnings which are, at least in some degree, affected "by the workman's incapacity. If I am right as to this, "it follows that, as a general rule, a man whose earnings are "reduced because he has been called up for service in His "Majesty's army cannot properly claim that his soldier's "pay and allowances shall be treated as his earnings for the "purposes of the sub-section. They represent a figure which "is wholly irrelevant to the calculation thereby prescribed. "The reduction in his income is due, not to his incapacity, "but to the fact that the legislature has made him (in common "with all other young men) liable for military duty." This statement was approved in this House (3). In other words, it was the lack of any connexion between the workman's injury and the employment from which the reduced earnings were derived that formed the basis of the decision. In a previous passage, after a reference (1) to *Blakemore's* case (2) and Lord Dunedin's dictum in *Heathcote's* case (3), my noble and learned friend said (4): "The fact that economic "depression or some other such cause has reduced the general "level of wages is no ground for saying that actual earnings "are shown to be an irrelevant consideration. The words of "the sub-section, as has been authoritatively held, do not "permit such a construction. It must have been contemplated "by the legislature that many causes might contribute, "together with the incapacity, to bring about a reduction in "earnings, and it is, perhaps, fortunate that the draughtsman "has used words which free the arbitrator from the delicate "task of allocating the loss to the various causes which, "in combination, may be responsible for it." These words accurately express my view of the result of the decision in *Blakemore's* case (2). The decision in *Jones's* case (5) was based on the finding by the arbitrator that the cause of his inability to earn 3*l*. 15*s*. 4*d*. was due, not to any physical incapacity, but solely to his conscription under the Act of 1939, an antithesis to the findings in the present case.

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(1) [1911] A. C. 413.
(2) [1943] K. B. 145, 151.
(3) [1944] A. C. 14, 21.

Accordingly, in my opinion, the appellant can derive no assistance from the case of *Jones* (5), and I may add that I am quite unable to find any justification for the suggestion that the decision, or the speeches of the majority of this House, in *Jones's* case (5) are inconsistent with the previous decision of this House in *Blakemore's* case (2).

This case was heard by the Court of Appeal along with a number of cases in which a similar contention was involved, and they held that case was ruled by the decision already given in one of these cases, *Sharplin* v. *W. B. Bawn & Co., Ld.* (6). I agree with the judgment of the court in this latter case, which was delivered by Somervell L.J., and, in particular, with the passage in which he states (7): "The conclusion we come to "on the construction of the section in principle and on authority "is as follows: if the workman is bona fide earning what he

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(1) [1943] K. B. 145, 150.
(2) 104 L. J. (K. B.) 459.
(3) [1918] A. C. 52, 56.
(4) [1943] K. B. 145, 151.
(5) [1944] A. C. 14.
(6) 63 T. L. R. 217; 40 B. W. C. C. 67.
(7) 63 T. L. R. 217, 220; 40 B. W. C. C. 67, 79.

" reasonably can earn, it is not open to the employer to diminish " the 'difference' between this figure and his pre-accident " earnings—actual or as adjusted under the Acts—by showing " that the whole or part of the reduction is due to changes in " the 'economic position of the labour market' between the " two dates. Conversely, when the workman, though on a " less well-paid type of work as a result of his incapacity, gets " more as a result of such changes, the employer gets the " benefit of this excess."

Accordingly, I am of opinion that this appeal fails, and should be dismissed with costs, the order of the Court of Appeal being affirmed.

LORD PORTER. My Lords, this case raises a question as to the quantum of compensation to be awarded to a workman who is admitted to be partially incapacitated, and turns upon the true construction of s. 9 of the Workman's Compensation Act, 1925. The wording of which immediate consideration is required is that of sub-s. 3 (i.) and the vital expression is:—
" . . . . the weekly payment in case of partial incapacity " shall be one-half the difference between the amount of the " average weekly earnings of the workman before the accident " and the average weekly amount which he is earning or is " able to earn in some suitable employment or business after " the accident."

Before his accident the average weekly earnings of the respondent, the workman in question, as revised, were 9*l.* 16*s.* 11*d.* and at the hearing of the reference the average weekly amount which he was earning was 8*l.* 12*s.* 3*d.*, a difference of 1*l.* 4*s.* 8*d.* Prima facie, therefore, his compensation should be half of the difference between the two sums, viz.: 12*s.* 4*d.* In fact, however, the diminution in his earnings is due not to the accident only but to economic causes, i.e., to a general reduction in the earning power of workmen engaged in a similar type of work, caused by the fall of wages. Admittedly, when he first came back to work his loss of earning power resulted from the accident, but when at a later date the wage of both workmen of full capacity and those partially incapacitated fell to a lower level, the respondent's loss of wages was caused partly by the accident but partially also by a fall in wages. It is said, therefore, that to give the workman half the difference between what he earned in the past and the lessened sum which he can earn at the present is to give him an undue advantage over his fellows and might indeed result, in certain circumstances, in his receiving more than a man able to work at full capacity. Suppose for instance that the full wage was originally 6*l*. and the wage of the injured man 4*l*. but owing to economic causes the full wage dropped to 4*l*. and that of the disabled man to 3*l*. If then his original earnings of 6*l*. be compared with those ultimately earned by him and he is given half the difference as compensation, he will receive 3*l*. as wages and 1*l*. 10*s*. as compensation, a total of 4*l*. 10*s*., where an uninjured man will receive 4*l*. only. Such a result, it is said, cannot have been intended and the section when properly construed bears no such meaning.

My Lords, the contention that account must be taken of change in economic conditions and that compensation must be reduced accordingly is supported by pointing out that in sub-s. 1 the incapacity must result from the accident and by the suggestion that, therefore, when one comes to construe sub-s. 3, it must be read as awarding the difference between the pre-accident earnings and the post-accident earnings so far only as their reduction results from the accident: a reduction which has nothing to do with the accident is said to be ruled out. Certain qualifications, however, must, it is admitted, limit the width of the contention. It is conceded that where a workman is driven out of a particular occupation and compelled to undertake another type of work and that type of work suffers a reduction in wages, the injured man is entitled to increased compensation. The tribunal, it is agreed, cannot and is not empowered to consider what his earnings in his original employment would have been. The pre-accident figure is fixed by the Act at the average weekly earnings before the accident and if the man can show that his actual post-accident average weekly earnings are less than this sum, the quantum of compensation is fixed at half the difference between the two, whatever the cause of the diminution may be, provided it is not due to some action for which the workman himself is responsible. The fact that he might have been earning less than before at his original work is irrelevant. But it is argued that where, as here, the workman remains in the same occupation and the only result of the accident is to make his working capacity slower and his earnings consequently less, the true result is that part only of the reduction in his wages is due to the accident, and the rest is due to economic conditions. For example, if he is working an eight-hour day and the payment is 2*s.* 6*d.* an hour, he would earn 1*l.* a day or in a 44-hour week 5*l.* 10*s.* If, however, the pace of his working is reduced by one-eighth, and his rate of wages is correspondingly reduced, he would earn only 17*s.* 6*d.* or in a 44-hour week 4*l.* 16*s.* 3*d.* and his compensation would be one-half of the difference of 13*s.* 9*d.* Suppose, then, the wage was reduced to 2*s.* an hour, the workman of full capacity would earn only 16*s.* a day or 4*l.* 8*s.* a week and the injured man 14*s.* or 3*l.* 17*s.* a week. His actual weekly loss from the accident in these circumstances, it is maintained, is not 13*s.* 9*d.* but 11*s.* To give him more would not be to compensate him for loss of earning power, but for the accidental and irrelevant economic conditions. What he is entitled to is compensation, and compensation in the ordinary sense of the word is a replacement of what he has in fact lost by the accident.

It is, however, further conceded that by the decision in *Delta Mill* (1919) *Ld.* v. *Blakemore* (1), the wording at the end of sub-s. 3 (i.) " which he is earning or is able to earn in some " suitable employment or business " has been held to deal with two contrasted cases. If the workman is in fact earning a wage one must look only at what he is in fact earning : what he is able to earn is irrelevant. The expression " is able " to earn," etc., only becomes effective where the man is either refraining from earning, or is unable to earn anything at all owing to ecomomic conditions or some similar cause. That proposition is not contested ; the point in controversy is whether one should imply in construing " is earning " or " is " able to earn " the addition of the words " solely as a result " of the accident." My Lords, I find it very difficult to make such an implication in the case of the words " is earning." As to the phrase " is able to earn " I desire to reserve my judgment, but the earlier expression seems to me to give an easy and simple rule. The pre-accident wage only is to be considered and compared with the actual earnings and then half the difference is to be given as compensation. If the post-accident wage goes up the employer gets the benefit and the compensation payable goes down. If, on the other hand, the post-accident wage goes down the workman benefits and his compensation goes up. The pre-accident earnings are a fixed sum calculated as prescribed by the Act. Formerly they did not vary with any subsequent changes which took place in the wages paid to those engaged in the same work and only do so now because of the provisions of s. 6 of the Act of 1943; but this provision has no application to the present case. No doubt the legislature, if it had so desired, might have provided that the workman should get half his actual loss in the conditions from time to time obtaining, and no more, but it has not done so.

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(1) 104 L. J. (K. B.) 459.

The appellants urged, however, that what was given was compensation and that compensation is limited to the actual loss which the man suffers. No doubt this is true where there is no indication to the contrary, but under this Act the man gets what the Act prescribes—no more and no less. He does not get the difference between the wages he would have been earning at any individual moment had he been uninjured and those which he was in fact earning at that moment. The statute gives him half the difference between his pre- and post-accident earnings. Nor do I see that anything is gained by a reference to sub-s. 1. Undoubtedly, incapacity must result from the accident, but the quantum of compensation for that incapacity is not necessarily confined to the difference between what the injured man can earn at a particular date and what his uninjured fellows are then earning. Apart from authority I should have reached this conclusion, but it is said that though the later authorities, and in particular *Delta Mill* (1919), *Ld.* v. *Blakemore* (1), might have led to this conclusion, the decision in *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (2) shows such a view to have been wrong and decides that the difference in earning power is irrecoverable except in so far as the loss is due to the accident and to no outside circumstances. My Lords, I cannot accept this view. *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (2) was a peculiar case. Admittedly his Army pay was " earnings " within the meaning of the Act. Your Lordships were bound by the decision in *S.S. "Raphael" (Owners)* v. *Brandy* (3) so to hold. But the reduction in his earnings had nothing to do with the accident: it was due to the extraneous fact that he had been called up for military service, an employment which was in no way connected with the injury. The arbitrator expressly found that the cause of his inability to earn more than his pay was not due to any physical incapacity but solely to his conscription

(1) 104 L. J. (K. B.) 459.
(2) [1944] A. C. 14.
(3) [1911] A. C. 413.

under the Act of 1939. In other words his inability to earn had no connexion with his accident. Whatever his physical condition he would have earned no more. In the present case and cases of the same class, the inability to earn more is at least connected with the accident inasmuch as the man cannot earn more in his injured state and could earn more were he uninjured. In *Jones's* case (1) the injury caused no reduction of earnings—injured or uninjured the man earned the same sum. The distinction may seem a fine one: nevertheless it exists. In my view there is no ground for dividing the quantum of loss into two parts, one due to this accident, the other to economic causes. The workman can earn no more because of his accident. It may be that at other times and in other circumstances he would have done so. As it is, he cannot, and the Act, as I think, plainly gives him the difference between the pre-accident figure and his actual earnings, where he is earning something, and it is not his doing that prevents him from earning more. I would dismiss the appeal.

Lord du Parcq: My Lords, my noble and learned friend, Lord Uthwatt, who is unable to be present, has authorized me to say that he concurs in the opinions which have been expressed. My Lords, I also concur in the opinions of your Lordships who have preceded me, and I only wish to add that I agree in particular with what was said by my noble and learned friend on the woolsack as to the effect of the case of *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (1).

Lord Oaksey. My Lords, I have had the advantage of reading in print the speech of my noble and learned friend Lord Thankerton and I agree with it.

Appeal dismissed.

Solicitors for appellants: *Waterhouse & Co., for Buller, Jeffries & Kenshole, Birmingham.*

Solicitor for respondent: *W. H. Thompson.*

(1) [1944] A. C. 14.

[HOUSE OF LORDS]

H. L. (E.)

1948

Feb. 26;
Apr. 30.

YEOMAN'S & PARTNERS, LIMITED . APPELLANTS;

AND

GODDEN . . . . RESPONDENT.

Workmen's compensation—Injury by accident—Partial incapacity—Diminution of earnings—Economic change in industry—Weekly payments—Calculation—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1; *s.* 9, *sub-s.* 3 (i.)

By s. 9, sub-s. 3 (i.) of the Workmen's Compensation Act, 1925: ". . . . the weekly payment in case of partial incapacity shall be "one-half the difference between the amount of the average weekly "earnings of the workman before the accident and the average "weekly amount which he is earning or is able to earn in some "suitable employment or business after the accident."

A painter who in July, 1944, suffered an accident arising out of and in the course of his employment, sustaining injuries to his right hand as a result of which he was thereafter partially incapacitated, returned to work in December, 1944, being employed as a storekeeper but paid at the rate of a painter. Until November, 1945, he earned as much as before the accident, viz., 6*l.* 8*s.* 9*d.* a week, but thereafter his earnings fell to 6*l.* 2*s.* 3*d.* a week, because his trade union would not allow its members to work more than forty-four hours a week without a special permit; this was operative as between the trade union and the employers and was one of the industrial conditions under which the workman obtained his actual wage. He admitted that, even apart from the accident, he could not earn more than he was doing anywhere in the labour market.

Held that he was entitled to receive as compensation weekly payments amounting to one-half of the difference between his pre-accident and his post-accident earnings. The re-employment of the workman at different work was due to his incapacity for his previous work and resulted from his injury; the fact that he was paid at the rate current for painters only helped to reduce the difference between his pre-accident earnings and his actual earnings.

Jones v. *Amalgamated Anthracite Collieries, Ld.* [1944] A. C. 14, distinguished.

Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal (Scott, Morton and Somervell L.JJ.)

The facts stated by LORD THANKERTON, were as follows: The respondent, who was then employed by the appellants as a painter, was injured by accident arising out of and in the course of his employment on July 5, 1944, and did not fully recover from the effects of that accident; he was admittedly not capable of performing his pre-accident work. He was paid all appropriate compensation until December 4, 1944, when he returned to work with the appellants, and was employed as a storekeeper, but was paid at the rate of a painter. Until November 9, 1945, he earned as much as he had earned before the accident, but after that date he earned less than his pre-accident earnings. On April 13, 1946, he applied in the Marylebone county court for arbitration under the Workmen's Compensation Acts, claiming compensation under s. 9, sub-s. 3 (i.) of the Act of 1925 as for partial incapacity in a weekly payment of one-half of the difference between his pre-accident earnings and his actual earnings since November 9, 1945. His pre-accident earnings, as revised under s. 6 of the Act of 1943, were 6*l.* 8*s.* 9*d.* per week, and his average weekly earnings since November 9, 1945, had been 6*l.* 2*s.* 3*d.* As a result of the accident, he lost the tip of the index finger of his right hand and sustained injuries to the tip of the middle and ring fingers of his right hand. He thereby became unable to do ladder work and had to use a lighter brush. He said, in his evidence, that his trade union would not allow its members to work more than forty-four hours per week unless a special permit was given by the union, and that the fall in his earnings was due to that. He admitted that he could not earn any more than he was doing anywhere in the labour market apart altogether from his accident. The learned arbitrator (His Honour Judge Bensley Wells), basing his view on his understanding of the decision of the House of Lords in *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (1), held that, as reduction in the respondent's earnings was in no way connected with the injury he had sustained, he was not entitled to any compensation but, of consent, he made a declaration of liability. On appeal by the present respondent, the Court of Appeal of consent set aside the award and referred the case back for further elucidation of the present respondent's statement as to the action of his union. After hearing further evidence, the learned arbitrator stated the further evidence, and formally repeated his former award. The parties were agreed that these trade union conditions were operative as between the union and the respondent's employers, the appellants, and became one of the industrial conditions under which the respondent obtained his actual wage. This case, like the case of *Illston & Robson,*

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* *Present:* LORD THANKERTON, LORD PORTER, LORD UTHWATT, LORD DU PARCQ and LORD OAKSEY.

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(1) [1944] A. C. 14.

Ld. v. *Smith* (1), was one of the group heard by the Court of Appeal, who held that it was also ruled by their decision in the case of *Sharplin* v. *W. B. Bawn & Co., Ld.* (2), and that the learned arbitrator was wrong in law in the construction which he put on *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (3), on which he based his decision. The Court of Appeal allowed the appeal, set aside the award, and remitted the matter to the Marylebone county court for compensation to be assessed at 50 per cent. difference between the pre-accident and post-accident earnings of the present respondent. The appellants appealed to the House of Lords.

Beney K.C. and *H. S. Nichols* for the appellants. The same point of law arises here as in *Illston & Robson, Ld.* v. *Smith* (1) and the appellants' argument in that case is adopted. Under s. 9, sub-ss. 1 and 3 of the Workmen's Compensation Act, 1925, a partially incapacitated workman is not entitled to one-half the difference between his pre-accident average weekly earnings, where the whole of the difference is due solely to the general economic conditions or to other causes unconnected with the injury by accident. This is supported in particular by s. 9, sub-s. 1 (*b*). The definition of "incapacity "for work" approved in *Ball* v. *William Hunt & Sons, Ld.* (4) is applicable to the facts of this case as showing that the respondent was not suffering from any "incapacity for work" within s. 9, sub-s. 1. There was no evidence of employers who, if he were able to do the work of a painter, would pay him more than he was earning. He was paid at the rate of a painter and as he did not show that his labour was "saleable "for less than it would otherwise fetch," he failed to prove that he was suffering from any existing partial incapacity: see also *Allen* v. *Tinsley Park Collieries, Ld.* (5). There is a distinction between physical injury and "incapacity for "work," e.g., a domestic servant who was physically disfigured might still be able to do his work admirably but could not get employment.

Paull K.C. and *R. M. Everett* for the respondent were not called on to argue.

THE HOUSE took time for consideration.

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(1) Ante p. 384.

(2) (1947) 63 T. L. R. 217; 40 B. W. C. C. 67.

(3) [1944] A. C. 14.

(4) [1912] A. C. 496, 499.

(5) (1944) 37 B. W. C. C. 28, 31.

April 30. Lord Thankerton. My Lords, though the facts are somewhat different in this case, this appeal will be found to raise the same question as to the proper construction of s. 9, sub-s. 3 (i.) of the Workmen's Compensation Act, 1925, as was raised in the case of *Illston & Robson, Ld.* v. *Smith* (1), in which judgment has just been delivered.

My Lords, I agree with the Court of Appeal, and this case is clearly ruled by the decision of this House in the case of *Illston & Robson, Ld.* v. *Smith* (1). The re-employment of the respondent by the appellants, not at his previous work, but at an admittedly different job, was obviously due to his incapacity for his previous job, and resulted from his injury. The fact that he was paid at the rate current for painters did not alter this, but only helped to reduce the difference between his pre-accident earnings, as revised, and his actual earnings. In my opinion, the appeal fails and should be dismissed with costs, the order of the Court of Appeal being affirmed.

Lord Porter. My Lords, I also agree with the Court of Appeal and with the reasoning and conclusion reached by my noble and learned friend on the woolsack.

Lord du Parcq. My Lords, my noble and learned friend, Lord Uthwatt, who is unable to be present, has authorized me to say that he concurs in the opinion delivered from the woolsack. My Lords, I also concur.

Lord Oaksey. My Lords, I agree.

Appeal dismissed.

Solicitors for appellants: *E. P. Rugg & Co.*
Solicitor for respondent: *W. H. Thompson.*

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(1) Ante p. 384.

[PRIVY COUNCIL]

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Apr. 27.

ENGLISH AND SCOTTISH JOINT CO-OPERATIVE WHOLESALE SOCIETY, LIMITED . . . . APPELLANT;

AND

COMMISSIONER OF AGRICULTURAL INCOME-TAX, ASSAM . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Revenue—Agricultural income-tax—Co-operative society—Grower of tea—Two member societies only—Whole output of tea sold to members—Market rates—Advances by members for production costs—Sale price of tea debited against advances—All net profits not necessarily distributable among members — Profits not exempt — Assam Agricultural Income-Tax Act (Assam Act IX of 1939), *ss.* 2, 3.

The appellant society, incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893, and non-resident in British India, had as its objects, inter alia, the carrying on of the "business of planters, growers, producers, merchants and manufacturers and brokers of tea." The society, which owned the estate in Assam where it grew and manufactured tea, consisted of only two members—co-operative societies—to which, with an immaterial exception, the whole of the society's output of tea was sold at market rates and exported to Great Britain. Each year the members of the appellant society paid, by way of advances to the society, sums of money to meet the cost of tea to be supplied to them, and the market prices of the tea were debited against those payments. The supplies were recorded as sales to the members. Out of the proceeds from the sales the expenses of production and management and the interest on loans were paid or provided, and by the rules of the society its net profits were so applicable as not necessarily to result in the distribution of all profit among the members of the society.

Held, that the society was not exempt from liability to Assam agricultural income-tax under the Assam Agricultural Income-Tax Act, 1939, in respect of profits from the sale to its members of tea cultivated or manufactured at its estate in Assam.

Principle in *New York Life Insurance Company* v. *Styles* (1889) 14 App. Cas. 381, held inapplicable. The principle in that case, where the business carried on by the company sought to be taxed was mutual insurance, could not be applied to an association, society or company which grew produce on its own land or manufactured goods in its own factories, using either its own capital or capital borrowed whether from its members or from others,

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

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and sold its produce or goods to its members exclusively. No matter who the purchasers might be, if the appellant society sold the tea grown and manufactured by it at a price which exceeded the cost of producing it and rendering it fit for sale, it had earned taxable profits. There was here no common fund to which the members of the appellant society contributed and in which they participated, so as to satisfy the cardinal requirement stated by Lord Macmillan in *Municipal Mutual Insurance, Ld.* v. *Hills* (*Inspector of Taxes*) (1930–32) 16 Tax Cas. 430, at 448, in dealing with the tax exemption of surpluses arising in the conduct of mutual insurance.

English and Scottish Joint Co-Operative Wholesale Society, Ld. v. *Commissioner of Income-tax, Madras* (1929) 3 I. T. Cas. 385, held wrongly decided.

Cornish Mutual Assurance Co. v. *Inland Revenue Commissioners* [1926] A. C. 281, *Liverpool Corn Trade Association, Ld.* v. *Monks* [1926] 2 K. B. 110 and *Thomas* v. *Richard Evans & Co., Ld.* [1927] 1 K. B. 33, referred to.

Judgment of the High Court varied, but affirmed in substance.

APPEAL (No. 75 of 1946) from a judgment of the High Court (April 24, 1945) on a reference under s. 28, sub-s. 1, of the Assam Agricultural Income-Tax Act, 1939, by the Assam Board of Agricultural Income-Tax.

The appellant society was incorporated in the United Kingdom, under the Industrial and Provident Societies Act, 1893, and its objects, briefly, were to carry on business as planters, growers, producers and merchants of tea, coffee, cocoa and other foreign and colonial products. At all times the society had two members only, the Co-Operative Wholesale Society, Ld., and the Scottish Co-Operative Wholesale Society, Ld. The two member societies advanced moneys to the appellant society to meet the cost of growing tea, which was grown on its own estate in Assam and then distributed to the two members. That transaction was regarded as a sale to the two members by the appellant society at the current market price of the tea, and the price was debited against the advances which had already been made by the member societies. The surplus over costs was dealt with by the appellant as to part to payment of interest on the share capital, carrying forward another part for various specified purposes, and distributing the balance moneys among the two member societies proportionately to their purchases of tea. The question referred to the High Court, in respect of the year of assessment 1939–40, was: "Whether "the Society is chargeable to Assam agricultural income-tax "in respect of the cultivation and/or manufacture of tea at its

"Deckiajuli Estate in the Province of Assam, and sold to its "members."

The High Court (Derbyshire C.J. and Gentle J.) answered the question of law in the affirmative.

1948. Mar. 16, 17. *Donovan K.C.* and *S. C. Isaacs* for the appellant. No profit arose from the transaction in question, the members merely put up money for a specific purpose and that part of it which was not required for the purpose was returned to them, and what was returned was not dividend, but merely the excess. In other words, it was an ordinary co-operative transaction. The very question in this case—whether the arrangement for the growing of tea by the appellant and the distribution to the two members in the manner indicated gave rise to agricultural income—was decided in India in 1929 when the income tax authorities contended that it did give rise to taxable income. In that case, however, *English and Scottish Joint Co-operative Wholesale Society, Ld.* v. *Commissioner of Income-tax, Madras* (1), the High Court in Madras decided that there was no income or profit arising to the appellant out of these transactions; that, in other words, they were purely mutual dealings, and accordingly no tax was payable because no income arose. There was, however, no appeal by the revenue authorities from that decision, which still stands in India. In the present case the High Court at Calcutta has declined to follow that decision. With regard to the authorities, *Last* v. *London Assurance Corporation* (2) has only a very remote bearing on the present case. *New York Life Insurance Company* v. *Styles* (3) was the principal case relied on by the appellant society in the court below, and, it is submitted, rightly, for if the provision of tea is substituted for the provision of insurance there is no difference in principle between that case and this. If it is a case of purely mutual dealing, incorporation makes no difference. The transaction here leaves no profit at all in the true sense; what is really being done is making a profit out of themselves; the sum returned is merely the excess of the price which the customer has paid in the first instance—it does not destroy the mutuality of the transaction. What is said against the appellant here is that it is dealing with its two members as if they were anybody else in the world, that it is an accident that they are

(1) (1929) 3 I. T. Cas. 385.

(2) (1885) 10 App. Cas. 438, 444.

(3) (1889) 14 App. Cas. 381, 393, 407.

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members, and that there is no difference between this case and a railway company which happens to carry its own shareholders. The answer to that is that what must be ascertained is the purpose of the whole transaction, and in the circumstances of this case the members are growing their own tea. What is returned is really a discount on the cost of the tea; there was no idea of trading with the outside world at all. *Liverpool Corn Trade Association* v. *Monks* (1) is an illustration of a case on the opposite side of the line; there was an intention to trade with anybody, but it was contended that in so far as the transactions were with shareholders they were mutual. It was held that the doctrine of mutuality could not be applied to that kind of case. There is a superficial resemblance between that case and this. There does not appear to be anything against the appellant here in *Thomas* v. *Richard Evans & Co.* (2); that case went on appeal to the House of Lords (3), when it was held that "the decision of the House in the case of "*Styles* (4) completely covers this case." *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioner* (5), which is referred to in the judgment in the present appellant's favour in the Madras case of 1929 (6), makes it clear that the mutual concern may carry on business, but that if it is purely mutual it does not earn profits. The doctrine of mutuality is explained in *Municipal Mutual Insurance, Ld.* v. *Hills* (*Inspector of Taxes*) (7); the question is whether the fact that there is a sale in the present case makes any difference. Applying the above-cited authorities to the present case, here is a co-operative society with two members, and each of them makes an advance to the society in order that tea may be grown and supplied to those who make the advances. Gentle J. said that they were advance payments for tea, and that is accepted. The tea is then sold to the two members, and what each of them pays shows a surplus over costs—what the members pay will of course be the advance, because that has been paid at the beginning of the year. That surplus is then divided in various ways—interest on share capital, sums carried to reserve, and a dividend to the members proportionate to their purchases. It is submitted that that is a typical example of mutual trading.

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(1) [1926] 2 K. B. 110.
(2) [1927] 1 K. B. 33, 46.
(3) [1927] A. C. 827, 830.
(4) 14 App. Cas. 381, 393, 407.
(5) [1926] A. C. 281.
(6) 3 I. T. Cas. 385.
(7) (1930–32) 16 Tax Cas. 430, 448.

True, it is trading, and there are sales, but there is no profit, because if two persons provided money so that each shall be supplied with a particular commodity, and the cost of so providing them is less than the money put up, the excess is not profit, it is simply an excess of the fund provided in the first place. The surplus, therefore, even if it is a surplus of a price which has been paid, is not, on coming back, a profit, and it is not made a profit by being so called, nor is it made a profit by reason that a third party has been incorporated to carry out the transactions, nor is it a profit because the surplus arises through a sale to you by the third party—there was a sale in *Styles'* case (1). The High Court misconceived the function and purpose of the appellant society and the nature of its transactions with its members, and was wrong in saying that there was a profit in this case.

Tucker K.C. and *B. Sen* for the respondent. This case is not concerned with insurance, but with ordinary trading, and it appears to be the first time that this matter has come before the Board or a court in this country. When a mutual society in fact carries on a trade in this manner there is clearly a liability under the Assam Act in respect of profit from tea which is cultivated and manufactured by the society and then sold to its own members. The society is carrying on a trade. After having made a sale at the so-called market prices to its members, it then, at a subsequent date, gives them what is called a dividend in proportion to the amount of their purchases. In other words, it returns a certain amount in respect of the very tea that they have bought. If the whole surplus was returned to its members then the contention that the dividend is nothing more than a trade discount could be well understood, and therefore the society would have made no profit at all; it would merely as it were, have charged cost price for its goods. There are, however, neither material nor facts nor figures on which to raise that question in this appeal. The position in *Styles'* case (1) was entirely different from that in this case. Mutuality does not come into this question; this is no different from a company, consisting of five hundred shareholders, which company buys groceries and sells them to those particular people. The dealings with the profits of the society show that the position is no different from that of an ordinary company; certain items to which the profits are to be applied are not a distribution of profits at all, e.g., depreciation of land (except agricultural land and tea gardens), buildings, live and rolling stock; appropriation to a reserve fund; appropriation to a special fund for making grants as determined in general meeting; and "the remainder, if any, carried forward "to the next account." Thus, some of the profits remain with the society. With regard to the Madras case, *English and Scottish Joint Co-operative Wholesale Society, Ld.* v. *Commissioner of Income-tax, Madras* (1), so far as the facts are concerned, there is no difference between the two cases, so if the decision of the High Court in the present case is right it would follow that the *Madras* case (1) was wrongly decided. The fallacy was in adopting the principle of *Styles'* case (2) to that case; *Styles'* case (2) was a true case of mutual trading, whereas in the present case the trading receipts are not the sums which were contributed by way of advance. This society stands on the same footing as an ordinary company so far as practical results are concerned. This appeal should be dismissed, and the decision of the High Court in the *Madras* case (1) declared to be wrong.

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(1) 14 App. Cas. 381, 393, 407.

Donovan K.C. replied. The principle underlying what is called mutual trading or business is that the property in question, in whatever form it appears, from start to finish belongs to the same people who provided it. The whole fallacy in the argument for the respondent was to begin with the appellant society and see what it is doing and say that it is an ordinary trading concern. The true point at which to begin is that at which the Chief Justice began in the *Madras* case (1), namely, to find these two societies buying their tea from outsiders and saying that they want to get it cheaper and then proceeding as was done in this case. The origin of this society is the same as that of all co-operative societies. It does not make a profit for the reason that the money still belongs to the two members; their whole project was simply to put up money for tea, and when the tea was in their possession to dispose of the excess of the moneys which they had put up. The appellant society was just as much part of the machinery as a spade with which the land is dug up.

April 27. The judgment of their Lordships was delivered by LORD NORMAND. The appellant, a society incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893, submits to review in this appeal a judgment of the High Court at Fort William in Bengal in a reference made under s. 28, sub-s. 1, of the Assam Agricultural Income-tax Act, 1939. By that judgment the High Court answered in the affirmative a question of law submitted by the Board of Agricultural Income-tax in relation to the assessment of the appellant for the year 1939–40. The question is "whether "the society is chargeable to Assam Agricultural Income-tax "in respect of the cultivation and/or manufacture of tea at "its Deckiajuli Estate in the Province of Assam, and sold to "its members." The question is neither grammatical nor intelligible as it stands, and the Statement of Facts omits to state some of the facts regarded by the parties as material for the decision of the question which the Board seems to have intended to submit. That question emerges clearly enough from a consideration of the proceedings which took place while the company's assessment was under consideration.

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(1) 3 I. T. Cas. 385.

(2) 14 App. Cas. 381.

The Assam Agricultural Income-tax Act applies to all agricultural income derived from land situated in the province of Assam (s. 5), and it provides by the charging section (s. 3) that agricultural income tax at the rate specified in the annual Assam Finance Acts shall be charged for each financial year on the total agricultural income of the previous year. The part of the definition section (s. 2) which is relevant to the present case defines agricultural income as any income derived from land used for agricultural purposes by agriculture. The Indian Income-tax Act contains a definition of agricultural income in the same terms, but by a rule (r. 24) made under it, "income derived from the sale of tea grown and manufactured "by the seller in British India shall be computed as if it were "income derived from business and 40 per cent. of such income "shall be deemed to be income profits and gains liable to tax." The scheme of the Assam Act is to tax the remaining 60 per cent. only of the income derived from the sale of tea grown and manufactured by the seller in Assam, and that result is secured by suitable provisions which need not be recited (see the explanation to s. 2, the proviso to s. 8 and r. 5 made under the Act). Under the Act appeals against assessment lie to the Assistant Commissioner of Agricultural Income-tax (s. 24) and from him to the commissioner (s. 26). When a question of law arises in the course of any assessment the Assam Board of Agricultural Income-tax may, either of its own motion or on reference from any Agricultural Income-tax authority subordinate to it, draw up a statement of the case and refer it with its own opinion to the High Court (s. 28).

The procedure which led to the reference under s. 28 can be briefly summarized. While the assessment was under consideration the appellant petitioned the Board of Agricultural Income-tax, Assam, to state a case to the High Court. The petition stated that the appellant society was a co-operative society incorporated under the Industrial and Provident Societies Act of 1893, and that the tea produced on its estates belonged to, and was distributed entirely to, its members, except certain inferior grades of dust teas which were sold in the Calcutta market, and that no profit accrued by such sales as the prices obtained were below the cost of production. The petition also stated that the question of law was whether the appellant society, owning tea estates in Assam, the produce of which is distributed only among its members, is liable to assessment to Assam income-tax. The Board refused the prayer of the petition, but subsequently changed its view and of his own motion the Board member stated the present case. It is unfortunate that he neither consulted the parties about the facts which were necessary to raise the supposed question of law, nor about the formulation of the question of law itself. For some reason he rejected the formulation suggested in the petition and substituted a question of his own. As the accompanying statement of facts merely stated that the tea produced by the appellant society (apart from the dust tea) was sold to its members and said nothing of the price, it can be inferred that the Board member intended to submit the question whether a business carried on by a society or company, whether incorporated or not, which cultivates produce on its own land and sells it exclusively to its own members, is by its nature incapable of begetting profits as that term is understood in the Assam Agricultural Income-tax Act or, since there is no distinction on this point, the Indian or the United Kingdom Income-tax Acts.

It is unfortunate that this question is presented in an abstract and general way without any statement of facts setting out or summarizing the society's accounts for the year of computation. The statement of facts is also defective for, besides failing to refer to the price at which the tea was sold, it omits to mention certain loans made to the appellant society by its members to which the appellant's counsel attached much importance. This Board was urged by both parties to proceed with the appeal as if the statement of facts contained in the judgment of Gentle J. in the High Court were substituted for the findings of fact in the submission. It is with reluctance that their Lordships would grant such an indulgence. But, taking into account the circumstance that the present case began not long after the Assam Agricultural Income-tax Act came into operation, and making allowance for the lack of experience which may have been the cause of the inadequate presentation of the case in the submission, they will accede to the parties' request. The facts as stated by Gentle J. are : " As previously mentioned the " Society is incorporated in the United Kingdom under the " Industrial and Provident Societies Act, 1893, it has an " unlimited capital divided into shares of 5*l*. each. It is non-" resident in British India. Its objects, as set out in its Rules, " inter alia, are : ' To carry on the business of planters, growers, " ' producers, merchants and manufacturers and brokers of " ' tea.' The Society consists of two members, namely, the " Co-operative Wholesale Society, Ld., and the Scottish Co-" operative Wholesale Society, Ld. The Society owns the " Deckiajuli Estate where it grows and manufactures tea. " Except a small portion of produce, which is unfit for export " and which is sold locally, the whole of the Society's output of " tea is sold to its two members at market rates and is exported " to England and Scotland. Each year the members of the " Society pay, by way of advances to the Society, sums of " money to meet the cost of tea to be supplied by the Society " to the members. The market prices of the tea, with which " the members are supplied, are debited against these payments. " The supplies are recorded as sales to the members. Out of " the proceeds from the sales, the expenses of production and " management and the interest on loans are paid or provided. " By the Rules of the Society its net profits are applied : " (*a*) In depreciation of land (except agricultural land and tea " gardens), buildings, live and rolling stock ; (*b*) payment of " interest not exceeding 6 per cent. per annum on the share " capital ; (*c*) appropriation to a reserve fund ; (*d*) appro-" priation to a special fund for making grants as determined " in general meeting ; (*e*) payment of a dividend to members " rateable in proportion to the amount of purchases made by " them from the Society ; and (*f*) the remainder, if any, carried " forward to the next account."

An argument was addressed to their Lordships by counsel for the appellant in which the advances made annually by the two members to the Society were treated as contributions by the members in cash which afterwards came back to them in kind when the tea was sold to them. This is a view of the transaction which their Lordships cannot accept. The advances were a loan to the society for the purpose of enabling it to produce tea on its own land. When the tea was produced it was sold to the lenders, and the price was set off against the amount of the loan. There was therefore a dual relationship between the appellant and its members; there was a mutual creditor-debtor relationship and there was a buyer and seller relationship. There was nothing notional about either of these relationships; they were not mere conventional machinery to give efficacy to a relationship which was in substance that of principal and agent. On the facts stated the members genuinely made a loan to the appellant; the appellant genuinely owned the land which it itself genuinely cultivated, and it genuinely sold the tea at a genuine market price to its members. The statement of facts shows that in the ordinary sense of the word profits might well result, for the proceeds of the sales might, and probably did, exceed the expenses of production and management and the interest on loans; that profits would result was in fact contemplated, and there are rules providing for the application of the net profits. These rules are made under the Industrial and Provident Societies Act, 1893, s. 10, which contemplates that a society registered under the Act will be a profit-making concern and therefore requires that all societies registered under the Act shall make such rules. The application of net profits which may be made under the rules is in essentials not different from the application of net profits which might be made by any trading company, and it need not result in the distribution of all profits among the members of the society. Thus any net profits applied under heads (*a*), (*c*), (*d*) and (*f*) would be retained by the appellant society.

When the constitution, rules and business practice of the appellant society so closely conform to the pattern of an ordinary profit-making concern, how can it plausibly be maintained that no profits can result? The answer to this question is to be found, if anywhere, in a case under the Indian Income-tax Act decided in the High Court at Madras (1), in which it was held on facts indistinguishable from those stated by Gentle J. in this case that this very society was a purely mutual co-operative society making no profits and, being within the ruling of *New York Life Insurance Co.* v.

(1) 3 I. T. Cas. 385.

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Styles (1), was not liable to be assessed to income-tax. It is on this decision that the appellants found their claim to exemption from the Assam Agricultural Income-tax Act. The High Court in the present case refused to follow the Madras decision and Gentle J., after considering it, *Styles*' case (1) and other authorities, expressed himself thus : " In the view which I hold, " the Society is a trading concern and carries on business as " growers, manufacturers and sellers of tea ; out of this " business it derives profits ; the dividends which it pays to " its members are a distribution amongst them of its trading " profit ; and the payments of these dividends are not a return " to the members of balances from the sums which they have " subscribed to the Society. . . . . The circumstance that the " Society's produce is sold to its members does not affect the " position and would not do so even if the Society were " restricted to selling to its members alone." In the Madras case the learned Chief Justice expressed the opposing view, which is the view now supported by the appellant's counsel. Before the incorporation of the Society, he says, " there existed " two large co-operative societies in Great Britain, one in " England known as the Wholesale Co-operative Society, Ld., " and the other in Scotland known as the Scottish Co-operative " Society, Ld. They were co-operative societies of the familiar " type which deliver goods to their members on a system the " object of which is to eliminate the profits of the middleman " as between those societies and their individual members. " The goods they were to distribute to their members the " Societies had, of course, to purchase in the market. A portion " of the goods so distributed were products of Southern India, " notably tea. The idea then occurred that a further elimination of outside profits could be effected by producing their " own tea and other products. Accordingly, the Corporation " now sought to be assessed was founded with the object of " acquiring and working estates in various parts of the world, " including Southern India, to supply the two original co-operative societies with the goods they required direct. . . . " In fact, the only shareholders in the English and Scottish " Society are the two original co-operative societies registered " in England and Scotland respectively, and the object of the " Society sought to be assessed is simply to run the estates, " grow the produce required and ship it to the two component " Societies which are its shareholders. . . . The Society

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(1) 14 App. Cas. 381.

" cannot make taxable profits out of its own component " elements, and, with that starting point established, it is to " my mind immaterial that the moneys that came into the hands " of the apex society are distributed in the form in part of a " dividend to the shareholders so long as those shareholders do " not include any person or body who is not a member of the " co-operative society " (1). He therefore concluded that the case fell within the principle of *Styles'* case (2).

The foregoing passage has been cited in extenso lest injustice should be done to it by condensing it in a summary. The learned Chief Justice has treated the motive for setting up the appellant society as material. There was in the case no finding about the motive, and the learned Chief Justice has assumed it; but motive is altogether irrelevant. The component members may have wished and intended that middlemen's profits should be eliminated, but the question is whether profits have in fact been earned by the appellant society which they set up. The learned Chief Justice has also failed to notice that tea grown on estates which belonged to the appellant society was not tea which the members could correctly describe as " their own tea." But the crucial part of the judgment is the affirmation that the society could not make taxable profits out of its own component elements. The proposition is derived by the Chief Justice from *Styles'* case (2). In *Styles'* case (2) and in the other cases in which the principle established by it was applied the business carried on by the company or society sought to be taxed was mutual insurance. The essence of that kind of business (with the exception of life insurance) is that a number of persons form an association which collects from the members contributions to a common fund, which the members authorize the association to use for payments in indemnity of the losses assured against, for defraying the expenses of management, and for repayment to themselves of any balance. In life insurance business the association is authorized to use the common fund not for payments in indemnity of losses but for payment of sums payable on the death of a member. But in the nature of things there are no profits to be made out of a mutual arrangement to share losses, and there are no profits to be made out of a mutual arrangement to pay a sum to executors or assignees on the death of an associate. It is also to be observed that in *Styles'* (2) and similar cases the

(1) 3 I. T. Cas. 396.

(2) 14 App. Cas. 381.

contributors to the common fund and the participators in it are two identical bodies. The role of the association is to collect from the associates the contributions to the common fund and to make the payments from it in accordance with the contributors' mandate, and this mandate may be, and usually is, written into the constituent documents of the association, which may or may not be a corporation. The association is therefore no more than a convenient agent for carrying out what the associates might more laboriously do for themselves. What kinds of business other than mutual insurance may claim exemption from liability to income tax under the principle of *Styles'* case (1) need not be here considered; but their Lordships are of opinion that the principle cannot apply to an association, society or company which grows produce on its own land or manufactures goods in its own factories, using either its own capital or capital borrowed whether from its members or from others, and sells its produce or goods to its members exclusively. In the present case the appellant society is not bound by its rules to sell its tea only to its members, but it could make no difference if it were. No matter who the purchasers may be, if the society sells the tea grown and manufactured by it at a price which exceeds the cost of producing it and rendering it fit for sale, it has earned profits which are, subject to the provisions of the taxing act, taxable profits.

It is next necessary to show that this view truly represents the judgments in *Styles'* case (1) and is in accordance with judicial comments subsequently made on them. The appellant in *Styles'* case (1) was a life insurance company the members of which were the holders of participating policies, each of whom was entitled to a share of the assets and liable for all losses. The company collected as premiums from members a sum to cover its requirements on a calculation of the probable death rate and of the probable expenses and other liabilities. An account was taken annually and the greater part of the surplus of premiums over expenditure was returned to the policy holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of the members. It was held that no part of the premium income received under the participating policies was liable to be assessed to income tax as profits or gains under Schedule D. Lord Watson, having distinguished the case from the earlier case of *Last* v. *London Assurance Corporation* (1), on the ground that in *Last's* case (1) some of the policy holders were outsiders whereas in *Styles'* case (2) the policy holders and they alone were members of the company, said " the individuals insured and those associated for the purpose of receiving their dividends, and meeting policies when they fall in, are identical; and I do not think that their complete identity can be destroyed, or even impaired, by their incorporation. The corporation is merely a legal entity which represents the aggregate of its members; and the members of the appellant company are its participating policy-holders. When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits " (3). Lord Herschell, after stating that the Attorney-General had conceded that the fact that the persons associating themselves together for the purpose of mutual assurance had been incorporated was immaterial, added " I think the Attorney-General was correct in thinking it immaterial that the persons thus associated had been incorporated, and that a legal entity had been created distinct from the members of which it was composed. This being so I shall, for the sake of simplicity, consider the questions that arise as though the association were unincorporated " (4). He later says, " Persons who agree to contribute to a common fund for mutual insurance, certainly would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit. Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. . . . . The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them, for this object, and accordingly their

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(1) 14 App. Cas. 381.

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(1) 10 App. Cas. 438.
(2) 14 App. Cas. 381.
(3) Ibid. 393.
(4) Ibid. 408.

"next contribution is reduced by an amount equal to their "proportion of this excess. I am at a loss to see how this can "be considered as a 'profit' arising or accruing to them "from a trade or vocation which they carry on" (1). From these quotations it appears that the exemption was based on (1.) the identity of the contributors to the fund and the recipients from the fund, (2.) the treatment of the company, though incorporated, as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate, and (3.) the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves.

Cornish Mutual Assurance Co. v. *Inland Revenue Commissioners* (2) was a case similar to *Styles'* case (3), and would have had the same result but for a provision in s. 53, sub-s. 2, of the Finance Act, 1920, which expressly provided that the surplus arising from the transactions between mutual trading concerns and their members should be treated as profits. The only importance for present purposes of the judgments in the case is that Lord Cave L.C. took occasion to question and correct Lord Watson's opinion that the company in *Styles'* case (3) was not carrying on a trade; it was carrying on a trade, but one in which no profits could be earned by it. In *Liverpool Corn Trade Association, Ld.* v. *Monks* (4), a company incorporated with the object of promoting the interests of the corn trade, with power to declare dividends, collected entrance fees from its members and made charges, both against members and other persons for the use of various facilities provided by it. It was found liable to income tax. The case is consistent with the view expressed by their Lordships because the shareholders and the contributors to the fund out of which dividends were paid were not identical. *Thomas* v. *Richard Evans & Co., Ld.* (5) was held by Rowlatt J. to fall within the principle of *Styles'* case (3). The association was a purely mutual assurance association and the contributors and the assured persons were identical bodies: any surplus of contributions over payments to policy holders was ultimately returned to contributors. Rowlatt J. said, "Where all that a company does is to collect "money from a certain number of people—it matters not

(1) 14 App. Cas. 409.
(2) [1926] A. C. 281.
(3) 14 App. Cas. 381
(4) [1926] 2 K. B. 110.
(5) [1927] 1 K. B. 33.

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" whether they are called members of the company or participating policy holders—and apply it for the benefit of those " same people, not as shareholders in the company, but as the " people who subscribed it, then, as I understand *Styles'* " case (1), there is no profit. If the people were to do the thing " for themselves there would be no profit, and the fact that " they incorporate a legal entity to do it for them makes no " difference ; there is still no profit. This is not because the " entity of the company is to be disregarded ; it is because " there is no profit, the money being simply collected from " those people and handed back to them, not in the character " of shareholders, but in the character of those who have " paid it " (2). The judgment came before the House of Lords and was affirmed (3). Lord Cave L.C. said, " Sooner or " later, in meal or in malt, the whole of the company's receipts " must go back to the policy holders as a class, though not " precisely in the proportions in which they have contributed " to them ; and the association does not in any true case make " a profit out of their contributions " (4). Lord Dunedin's judgment was to the same effect.

In *Municipal Mutual Insurance, Ld.* v. *Hills* (*Inspector of Taxes*) (5) a company formed primarily for the purpose of mutual insurance against fire also carried on employers' liability and other miscellaneous insurance business. It was admitted that the fire insurance business was purely mutual and did not attract tax. But it was found as a fact that on the other side of the business the redundant part of the premiums was not returnable to the contributors of the premiums, and it was therefore held that the surplus was subject to tax. Lord Macmillan, dealing with the tax exemption of surpluses arising in the conduct of mutual insurance, said, " the cardinal requirement is " that all the contributors to the common fund must be entitled " to participate in the surplus and that all the participators " in the surplus must be contributors to the common fund ; " in other words, there must be complete identity between the " contributors and the participators. If this requirement is " satisfied, the particular form which the association takes is " immaterial " (9). The requirement is not satisfied in the present case : for there is no common fund to which the members of the appellant society contribute and in which they participate.

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(1) 14 App. Cas. 381.
(2) [1927] 1 K. B. 47.
(3) [1927] A. C. 827.
(4) Ibid. 832.
(5) 16 Tax Cas. 430.
(6) Ibid. 448.

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For these reasons the appeal fails; and the Madras case (1), in which the appellant society was concerned, must be held to have been wrongly decided.

In the course of the debate the suggestion was thrown out that on the facts and accounts of a particular year the appellant society might be in a position to maintain that a payment to its members under para. (*e*) of the rules for the application of profits fell to be treated as a discount having the effect of reducing the price of the tea sold to the members and so reducing or, perhaps, eliminating the profits. Their Lordships are not concerned to discuss that suggestion in this appeal and express no opinion, favourable or unfavourable, on it.

It is expedient, in view of the defects of the question, to answer it not by a simple affirmative, but by declaring that the society is not exempt from liability to Assam agricultural income-tax in respect of profits from the sale to its members of tea cultivated or manufactured at its Deckiajuli Estate in the province of Assam. Their Lordships will therefore humbly advise His Majesty that the judgment of the High Court should be varied by the substitution for an affirmative answer to the question of this following answer: "The Society is not exempt "from liability to Assam agricultural income-tax in respect of "profits from the sale to its members of tea cultivated or "manufactured at its Deckiajuli Estate in the province of "Assam," and that subject thereto the appeal should be dismissed. The appellant must pay the costs of this appeal.

Solicitors for appellant: *Coward, Chance & Co.*

Solicitor for respondent: *Solicitor, High Commissioner for India.*

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(1) 3 I. T. Cas. 385.

Considered. GWYTHER v. BOSLYMON QUARRIES [1950] 2 K. B. 59

H. L. (N. I.)*

[HOUSE OF LORDS]

1948

Apr. 7, 8, 9, 13, 14; May 13.

RUSSELL (INSPECTOR OF TAXES) . APPELLANT;

AND

SCOTT . . . . RESPONDENT.

Revenue — Income tax — Assessment — Sand-pit situated on farm — Sales of sand—" Concerns of the like nature "—Income Tax Act 1918 (8 & 9 *Geo.* 5, *c.* 40), *Rules Applicable to sch. A., No. III, r.* 3.

By the Income Tax Act, 1918, Rules Applicable to sch. A., No. I, " General Rule for estimating the annual value of lands, " tenements, hereditaments or heritages " it was provided: " In " the case of all lands, tenements, hereditaments, or heritages " capable of actual occupation, of whatever nature, and for what- " ever purpose occupied or enjoyed, and of whatever value (except " the properties mentioned in No. II and No. III of this schedule), " the annual value shall be understood to be: (1.) The amount " of the rent by the year at which they are let, if they are let at a " rackrent and the amount of that rent has been fixed by agree- " ment within the period of seven years preceding April 5 next " before the time of making the assessment; or (2.) If they are " not let at a rackrent so fixed, then the rackrent at which they " are worth to be let by the year." By No. III " Rules for esti- " mating the annual value of certain other lands, tenements, " hereditaments or heritages which are not to be charged according " to the preceding General Rule," r. 3 provided: " In the case of " ironworks, gasworks, salt springs or works, alum mines or works, " waterworks, streams of water, canals, inland navigations, docks, " drains or levels, fishings, rights of markets and fairs, tolls, " railways and other ways, bridges, ferries and other concerns of the " like nature having profits from or arising out of any lands, tene- " ments, hereditaments or heritages, the annual value shall be " understood to be the profits of the preceding year." By s. 28 of the Finance Act, 1926, the concerns included in No. III of sch. A were transferred to and included in sch. D.

From 1941 to 1944 a farmer owning a farm of about 25 acres permitted divers contractors to dig and carry off sand from his land, chiefly for the construction of aerodromes, and charged from 6*d*. to 1*s*. a ton according to quality. The sand-pit so dug, which was an acre in extent and 30 to 40 feet deep and which had not previously been exploited, was worked continuoly each day by the contractors' workmen. The farmer did not advertise sand for sale but employed a person to check the quantities taken and there was a regular system of rendering accounts and making payments. He was assessed to income tax (sch. D) for the years 1940–1,

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* *Present:* VISCOUNT SIMON, LORD PORTER, LORD SIMONDS, LORD NORMAND and LORD OAKSEY.

1941–2 and 1942–3 in the sums of 150*l.*, 1,250*l.* and 3,750*l.* respectively

Held, that, though the farmer was carrying on a "concern," it was not a concern "of the like nature" to those enumerated in r. 3 of No. III and, accordingly, the assessments must be discharged, since the whole farm ought to be assessed under No. I.

Mosley v. *George Wimpey & Co., Ld.* (1945) 173 L. T. 24; 27 Tax Cas. 315, overruled.

Decision of the Court of Appeal in Northern Ireland affirmed.

APPEAL from the Court of Appeal in Northern Ireland.

The facts, stated by VISCOUNT SIMON, were as follows: The question in this appeal was raised by a case stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland. The respondent was the owner in fee simple of a farm of some twenty-five acres in the county of Londonderry. It was discovered that, under a portion of the surface of this farm, extending to about one acre, sand existed in considerable depth and the respondent allowed various persons to come on his land, dig sand, and take it away, with the result that a sand-pit was formed which was regularly and continuously worked from January, 1941, until about October, 1944, by which time the pit was practically exhausted. The sand was of different qualities and the respondent's charges varied from between sixpence to one shilling per ton according to the quality of the sand gotten. The hours of working at the pit were from 8 a.m. to 6 p.m. daily. A road to the sand-pit from the county road was, with the respondent's approval, made by a Mr. Moore, who was the earliest and biggest contractor. The demand for this sand principally arose in connexion with the construction of aerodromes in Northern Ireland. The sand was excavated by the various contractors' men by shovelling, and was loaded into lorries for removal. The respondent employed a man to record the tonnage of sand taken in each case, and this employee supervised the pit generally and directed the various contractors to the particular part of the face of the pit where each should work. There was a regular system for rendering accounts, for checking them and for receiving payments. The profits made by the respondent from the disposal of sand from this sand-pit amounted to 150*l.* in 1940–41, 1,250*l.* in 1941–42 and 3,750*l.* in 1942–43. The revenue contended that the respondent, in connexion with this sand-pit, was carrying on a concern

" of the like nature " within the meaning of those words in No. III, r. 3 of the Rules Applicable to Schedule A. If so, income tax would be separately charged by reference to the profits made by him in the preceding year. The respondent, on the other hand, argued that what he was doing in connexion with this sand-pit did not amount to the carrying on of a " concern " at all, and that even if it did, it was not a concern " of the like nature " within the meaning of r. 3. If this contention prevailed, income tax would be charged on the annual value of the farm as a whole, calculated as directed for Ireland by s. 187 of the Income Tax Act, 1918. The commissioners decided against the respondent on both points, but stated a case which set out the facts found by them, and formulated their decision thus: " We find that the sales of " sand by the appellant " (the present respondent) " which " amounted to more than 100,000 tons and extended over " three years, were by way of trade, that they were not merely " casual and occasional but constituted a series of transactions " carried out in pursuance of a regular method and we arrive " at the conclusion that the sand-pit was a concern carried on " by the appellant. Further, following the decision in the " Court of Appeal in *Mosley* v. *George Wimpey & Co., Ld.* (1), " we hold that it was a concern of a like nature with those " enumerated in r. 3 of No. III of sch. A. We accordingly " confirm the assessments appealed against in principle and " leave the figures to be agreed between the parties." When the matter came on appeal before Black J., the learned judge considered himself to be bound by the views expressed in an earlier stage of the same controversy by the Court of Appeal in Northern Ireland, and consequently reversed the view of the commissioners. In the Court of Appeal Andrews C.J., confirmed the commissioners' view that the respondent was conducting a " concern," but rejected the commissioners' other conclusion that it was a concern " of the like nature." Babington L.J. considered the revenue's contention to be wrong on both points, saying, as regarded the first, that he could find no evidence to justify the finding of the commissioners that the respondent carried on any " concern " or did anything more than convert his sand into money. Porter L.J. agreed with the view that there was no concern " of the like nature " being carried on by the respondent, and thus the Court of Appeal was unanimous in holding that the revenue's claim

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(1) (1945) 173 L. T. 24; 27 Tax Cas. 315.

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failed. From this decision an appeal was brought to the House of Lords.

Curran A.-G. for Northern Ireland, Topping K.C. (of the Irish Bar), *Reginald Hills* (of the English Bar) and *F. A. L. Harrison* (of the Irish Bar) for the appellant. The sand-pit and its operation and the sale of sand from it by the respondent constituted a concern " of a like nature, having profits from or " arising out of any lands, tenements, hereditaments or " heritages " within r. 3 of No. III of the Rules Applicable to Schedule A to the Income Tax Act, 1918, since a sand-pit is one of a class of concerns of like nature with those enumerated therein. The words " of a like nature " are not very precise but these rules clearly draw a distinction between normal or ordinary use of land and an extraordinary use of land. A normal use of land is agriculture or forestry or building a house. In such cases assessment is by reference to annual value, as defined by No. I, and that annual value is unlikely to vary each year. An extraordinary use of land involves some intensive exploitation of the surface or sub-soil, e.g., by taking stone out of the land or by standing a factory on it. Here No. III would apply, for the profits are liable to vary from year to year. It includes all concerns connected with land which are of a commercial nature : see the definition of " trade " in s. 237 of the Income Tax Act, 1918. The concerns included in No. III have been transferred to sch. D. by the Finance Act, 1926, s. 28, but, though they were formerly dealt with under sch. A., because the taxpayer's income was primarily derived from his property in the land, the distinction was yet recognized between the proprietor who put his land to a normal use and the proprietor who put it to an extraordinary use by way of trade, producing uncertain annual returns : see Income Tax Act, 1803 (43 Geo. 3, c. 122), ss. 102, 103 and 104. Thus, the scheme of the Act is in accordance with good sense. In construing the words " of the like nature," the activities mentioned in r. 3 should be taken distributively as illustrations, so that any concern is included, which is like any one of those mentioned and thus a very wide net is thrown. Alternatively, the specific concerns enumerated should be regarded as a single collection with characteristics in common. These characteristics are : (*a*) a use of land the return from which could not be appropriately dealt with under No. I ; (*b*) the earning of a return which is variable in amount ;

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(*c*) a special use of land by exploitation of the land itself or of its constituent parts or of rights in or over land and (*d*) exploitation by commercial methods. A sand-pit is ejusdem generis and falls within the class of concerns enumerated in r. 3. It is, for instance, of like nature to an alum mine or salt springs. Similarly concerns for working china clay have been customarily assessed under r. 3: see *Hext* v. *Gill* (1). *Edmonds* v. *Eastwood* (2) is inconclusive on this issue but reliance is placed on the observations of Martin B. *Mosley* v. *George Wimpey & Co., Ld.* (3) was rightly decided and to dismiss this appeal would involve overruling it. [They also referred to *Edinburgh Southern Cemetery Co.* v. *Kinmont (Surveyor of Taxes)* (4); *Ystradfodwg & Pontypridd Main Sewerage Board* v. *Bensted (Surveyor of Taxes)* (5); *Shaw* v. *Lichfield Conduit Lands Trustees* (6) and *Fry* v. *Salisbury House Estate, Ld.* (7).] It is not contended that a sand-pit is a quarry of stone within r. 1 or a mine within r. 2.

King K.C. (of the English Bar), *M'Coy K.C.* (of the Irish Bar) and *H. A. McVeigh* (of the Irish Bar) for the respondent. Two questions arise: (*a*) whether what was being done by the respondent was a " concern " and (*b*) whether, if it was a " concern," it was a concern " of the like nature " within r. 3. The answer to both questions is in the negative. On the facts the respondent derived all his profits from his property right as owner of the land or from his occupation of it or from a combination of the two, and, accordingly, his liability to tax would be completely covered by assessments under sch. A and sch. B. One must address one's mind to what he was doing. There is no evidence that he organized himself as a trader in sand, for he never put a spade into the ground. That was done by the contractors. A trade may consist of buying and selling or manufacturing or rendering services but here there was none of these things. The respondent was merely licensing persons to take away part of the soil and that was not a " concern " on his part, so that there was no activity by him sufficient to warrant the conclusion that he was trading. He was merely exercising his property rights in land which in limine was subject to income tax on its annual value under No. I and not otherwise. The onus is on the Crown to establish without doubt that what he was doing was within r. 3 of No. III; the words of charge must clearly apply. From *Croft* v. *Sywell Aerodrome, Ld.* (1) it appears what a great deal can be done by way of exercising property rights without going beyond the scope of No. I. The origins of sch. A are to be found in the Income Tax Act, 1805 (45 Geo. 3, c. 49), s. 37 and the Income Tax Act, 1806 (46 Geo. 3, c. 65), s. 74. The words "other "concerns of the like nature" first occur in No. III, r. 6, of the latter following a list of concerns, which, with some subsequent additions, is the same as that in the present r. 3. Sand-pits must have been familiar then and if they had been intended to be included they would have been specifically mentioned. From the list it is apparent that in the instances mentioned it is the concern that is carrying on the work, whereas a sand-pit is not a concern but a feature of nature. Admittedly it comes within neither r. 1 nor r. 2 and the Crown relies entirely on r. 3. But in the case of the concerns within r. 3 the land, while being put to divers uses, remains in its pristine condition, the fruit coming from the exploitation of proprietary rights. In contrast to the enterprises included in rr. 1 and 2, there is no abstraction of the land but only a special use of it. Hence no concern can be within the words "of the like nature" unless the corpus is preserved while the land is being used, and a sand-pit in which the sand is gradually exhausted cannot be within r. 3. The inclusion in r. 3 of alum mines and salt springs may seem to present some difficulty but in both instances the principal activity is not extraction but processing: see Encyclopædia Britannica (1946 ed.), vol. I, p. 762 and vol. XIX, p. 896. Accordingly, as this case falls neither within r. 3, nor within r. 1 or r. 2, it must fall within No. I, for the question of the making of profits is irrelevant and the tax in the case of this sand-pit does not depend on it. Apart from *Mosley* v. *George Wimpey & Co., Ld.* (2) none of the authorities cited for the Crown bears on the present case. That case was wrongly decided. If it were right, one might be faced with the difficulty of several persons carrying on a concern on the same spot.

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(1) (1872) L. R. 7 Ch. 699, 703.

(2) (1858) 2 H. & N. 811, 812.

(3) (1945) 173 L. T. 24; 27 Tax Cas. 315.

(4) (1889) 17 R. 154; 2 Tax Cas. 516.

(5) [1906] 1 K. B. 294; [1907] 1 K. B. 490; [1907] A. C. 264.

(6) (1920) 7 Tax Cas. 597.

(7) [1930] A. C. 432, 445, 469.

Curran A.-G. for Northern Ireland in reply. This is admittedly a case of an assessment under sch. A of the Act of 1918. The

(1) [1942] 1 K. B. 317.

(2) 173 L. T. 24; 27 Tax Cas. 315.

question is whether it is within No. I or No. III. The dicta running through the cases on which the Crown has relied are inconsistent with the respondent's arguments. In particular *Edinburgh Southern Cemetery Co.* v. *Kinmont* (*Surveyor of Taxes*) (1) still stands and reliance is placed on the dicta there. Clearly a sand-pit is more closely connected with r. 3 of No. III than the selling of grave-plots, where there was no question of extraction of the soil: see also *R.* v. *Bath Corporation* (2). As to the point relied on by the respondent with regard to the extraction of part of the soil, this is not consistent with the inclusion in r. 3 of alum mines and salt springs, and, moreover, there is no reason for treating concerns involving such extraction differently from others. In r. 3, one does not escape from concerns involving extraction. The respondent's distinction between processing and merely using land introduces needless complication. The words "other concerns "of the like nature" mean "other concerns like any of the "above." Sand-pits are like salt springs or alum mines. The distinguishing feature which places a case within No. III instead of No. I is the existence of a trading enterprise producing varying profits or returns. Fundamentally this is a No. III case. In the Income Tax Act, 1803, the various items of No. III were brought together: see ss. 102, 103 and 104. It is not till the later Acts that they are found segregated.

THE HOUSE took time for consideration.

May 13. VISCOUNT SIMON. My Lords, in order to reach a correct conclusion in this difficult matter it is necessary to examine the language of parts of sch. A with much care. It is first to be observed that No. I is the General Rule to which No. III, like No. II, is an exception. There is nothing, therefore, in the scheme of the schedule to require that No. III should be given a wider interpretation than its terms on their natural construction require. All that will happen when tax under sch. A is charged "in respect of the property in all lands, "tenements, hereditaments, and heritages in the United "Kingdom" is that, if the case does not fall within either of the rules which constitute exceptions, it will fall under the General Rule No. I and the tax will be calculated on annual value as therein defined. Number III is headed: "Rules for "estimating the annual value of certain other Lands, Tene-

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(1) 17 R. 154; 2 Tax Cas. 516.

(2) (1811) 14 East, 609, 620.

"ments, Hereditaments, or Heritages which are not to be "charged according to the preceding General Rule" and provides as follows: "1. In the case of quarries of stone, slate, "limestone, or chalk, the annual value shall be understood to "be the profits of the preceding year. 2. In the case of mines "of coal, tin, lead, copper, mundic, iron and other mines, "the annual value shall be understood to be the average "amount for one year of the profits of the five preceding "years . . . . 3. In the case of ironworks, gasworks, salt "springs or works, alum mines or works, waterworks, streams "of water, canals, inland navigations, docks, drains or levels, "fishings, rights of markets and fairs, tolls, railways and other "ways, bridges, ferries, and other concerns of the like nature "having profits from or arising out of any lands, tenements, "hereditaments or heritages, the annual value shall be understood to be the profits of the preceding year. 4. Tax under "the above rules shall be assessed and charged on the person "or body of persons carrying on the concern, or on the agents "or other officers who have the direction or management of "the concern or receive the profits thereof." Section 28 of the Finance Act, 1926, transferred the calculation of tax in respect of properties included in No. III to Case I of sch. D, and consequently the measure is now the profits of the preceding year in r. 2 as well as in rr. 1 and 3.

I agree with Andrews C.J. that what the respondent was doing in connexion with his sand-pit amounted to the carrying on of a "concern." The question is not, of course (as the language of the commissioners, if strictly read, might seem to imply), whether the sand-pit was itself a "concern" but whether the respondent's activities in connexion with it amounted to the carrying on of a "concern," and this, I think, is what the commissioners really meant by their finding. "Concern" is a very wide word, and appears to imply an adequate degree of business organization for the purpose of carrying on the undertaking. But the amount of organization needed must depend upon the character of the "concern" itself. It will be noted from the language of r. 4 that all the various enterprises in rr. 1, 2 and 3 are spoken of as "concerns" and it is obvious that the amount of organization needed for a toll or for streams of water would be vastly less than for a mine of coal or for gasworks. The language of r. 4 implies that, in order to amount to a "concern", there must be direction or management as well as the receipt of profits. Here the facts found by the commissioners show that there was a regular system of direction and management sufficient for the exploiting of the sand-pit by its owner, and the commissioners had material before them on which they could properly arrive at the conclusion of fact that the respondent was carrying on a "concern." Such a conclusion must be accepted unless there were no facts to support it, and in my opinion the conclusion can be supported by the material in the case. I should myself draw the same conclusion.

All this, however, will not assist the appellant unless the conclusion is also reached that the "concern" was a concern "of the like nature" within the meaning of r. 3. In view of the heterogeneous list of specific undertakings which precedes this phrase, it is a matter of the greatest difficulty to determine whether the phrase can properly include a sand-pit. Indeed, if a collection of items is heterogeneous, it almost seems a conflict in words to say that they belong to the same genus. But there the words are in the statute, and, if possible, the phrase must be given some meaning.

The arguments before the House have sought an interpretation by pursuing two alternative methods. One method is to search for some common feature in the specific items regarded as a single collection. The other method is to treat the phrase as though it ran, "other concerns of the like "nature to any one of the above." The two contrasted methods are illustrated in the judgments of Scott L.J. and du Parcq L.J. in *Mosley* v. *George Wimpey & Co., Ld.* (1), where the Court of Appeal held that the undertaking of working a gravel-pit by a company, which had acquired the exclusive right to do so, fell within the words now under examination. In that case Scott L.J. took the view that the list of specific undertakings in r. 3 constituted a single genus because they all involve a special or intensive use of the land with a view to its exploitation for commercial profit as distinguished from what he regarded as the ordinary use of land for agricultural purposes (including forestry) or for the site of buildings and the like. du Parcq L.J., on the other hand, was prepared to hold that a gravel-pit could be regarded as analogous to certain items in the list, viz., "salt springs or "works" or "alum works," as these are instances in which profits are made by commercially dealing with mineral deposits on or under the land.

The phrase "other concerns of the like nature," following a

(1) 173 L. T. 24; 27 Tax Cas. 315.

whole list of concerns which, with some more recent additions, constituted the specific subject matters of what is now r. 3 of No. III, first appears in the Income Tax Act, 1806 (46 Geo. 3, c. 65), s. 74. " Gasworks " and " railways " were added to the list by the Income Tax Act, 1842 (5 & 6 Vict., c. 35). Mr. Cyril King, in resisting the contention that a sand-pit could be included as ejusdem generis with what went before, pointed out that in nearly all of the specific cases in r. 3, the ground itself is substantially preserved while the concern is being carried on, and there is no abstraction of the land but only a special use of it, whereas in rr. 1 and 2 the profit was made by abstraction of a wasting asset. Hence, he argued, a concern which involves the abstraction and ultimate exhaustion of sand or gravel could not be within r. 3. Moreover, as such concerns as these were neither any of the quarries specified in r. 1 nor mines dealt with in r. 2, it followed that the tax under sch. A of the concern of carrying on a sand-pit did not depend on profits, but fell within the General Rule No. I. One difficulty in the way of this argument is that an alum mine would apparently involve substantial extraction. Moreover, this view of the matter would not only involve dissent from the Court of Appeal's decision in *Mosley* v. *George Wimpey & Co., Ld.* (1) above referred to, but also would be inconsistent with views expressed as to the scope of r. 3 in *Edinburgh Southern Cemetery Co.* v. *Kinmont* (*Surveyor of Taxes*) (2). This last case deserves careful consideration in connexion with the present matter, but it is not necessary in this appeal to reach a conclusion whether it is correctly decided or not.

The Crown's contention in the present case involves the drawing of a distinction between the " ordinary " and the " extraordinary " use of land, and by the latter is meant some intensive exploitation of the surface or subsoil, by means of which a profit is derived, which is likely to vary from year to year, as distinguished from the " normal " user of land, of which its use for agriculture or forestry or for the site of buildings are regarded as examples. In the latter case the assessment is by reference to annual value as defined in No. I and such annual value is not likely to vary each year. On this view of the matter No. III applies where the land is specially exploited as distinguished from being normally used. It is suggested that such a contrast, though difficult to work out exactly, corresponds with the common sense of the matter and with the general scheme of income tax, for although the owner of land thus specially exploited was originally dealt with under sch. A because his income was primarily derived from his property either in or under the land, it was still desirable to draw a distinction between the proprietor who made a valuable profit by extraordinary user and the proprietor in whose case the use to which the land was put was " normal." Whatever view may be taken of this contention, it does not, to my mind, decide the present issue in favour of the Revenue. The difficulty of classifying the exploitation of sand-pits, or gravel-pits, as extraordinary or abnormal uses of land still persists. The digging and carrying away of sand or of gravel have been, I apprehend, one of the normal uses of suitable areas of land from the earliest times. The very fact that a concern depending on a sand-pit requires so little organization makes me doubt whether an enterprise of this sort can properly be thrown into the " extraordinary " class. If, in the contemplation of the legislature, the exploitation of sand-pits or gravel-pits was an example of the special cases included in r. 3 of No. III, it is difficult to imagine why the rule did not specifically mention so obvious and so common an example. The same consideration applies to clay for making bricks, and in *Edmonds* v. *Eastwood* (1), a very strong Court of Exchequer held that a brickfield was not within No. III. Pollock C.B., Watson B., Channell B., and Martin B. (2), all took the view that the getting of such material from land would not bring into play the special rule. It does not appear that this decision was brought to the attention of the Court of Appeal in *Mosley* v. *George Wimpey & Co., Ld.* (3), nor is there any reference to it in the judgments delivered in that case. It is possible that it may have been overlooked because *Edmonds* v. *Eastwood* (1) is not a revenue case, but the importance of what the Court of Exchequer then laid down cannot be minimized.

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(1) 173 L. T. 24; 27 Tax Cas. 315.

(2) 17 R. 154; 2 Tax Cas. 516.

My conclusion, therefore, is that the concern of working a sand-pit, such as is found to exist in this case, does not fall within the concerns covered by r. 3 of No. III and that the whole farm ought, as the Court of Appeal in Northern Ireland held, to be assessed under the General Rule No. 1. This conclusion involves the overruling of the ratio decidendi of *Mosley* v. *George Wimpey & Co., Ld.* (3). We were informed that concerns for working china-clay have been customarily assessed under r. 3 of No. III, and, in view of the much greater elaboration of that process, which involves operations akin to mining (see the account given in *Hext* v. *Gill* (1)), the present decision does not necessarily affect that practice.

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(1) 2 H. & N. 811.

(2) Ibid. 815.

(3) 173 L. T. 24; 27 Tax Cas. 315.

I must add that the language of the rule is so obscure and so difficult to expound with confidence that—without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind—I feel that the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected. In the present instance, this reasonable clearness is wanting. I move that this appeal be dismissed with costs.

Lord Porter. My Lords, I concur.

Lord Simonds. My Lords, the relevant facts of this case have been so fully stated that I need not repeat them nor should I think it necessary to add anything upon the general questions of law that arise but for the importance of the case and the fact that it is necessary to consider and in effect overrule the decision of the Court of Appeal in England in *Mosley* v. *George Wimpey & Co., Ld.* (2).

The two questions of law, which are in truth two branches of one question, are (1.) whether that which the respondent did in relation to a sand-pit forming part of his farm at Glebe in the county of Londonderry was the carrying on of a " concern " and (2.) if so, whether it was a " concern of the like nature " having profits from or arising out of any lands " within the meaning of r. 3 of No. III of sch. A to the Income Tax Act, 1918.

On the first question I will add nothing to what has been said by my noble and learned friend on the woolsack. It is on the second question that I wish to make some observations.

My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion. Here it is sought

(1) L. R. 7 Ch. 699, 703.

(2) 173 L. T. 24; 27 Tax Cas. 315.

to tax the owner and occupier of land in respect of the profits made by him from the sale of sand on the footing that in effecting those sales he is carrying on a concern which is " of the like " nature " to " ironworks, gasworks, salt springs or works, " alum mines or works, waterworks, streams of water, canals, " inland navigations, docks, drains or levels, fishings, rights of " markets and fairs, tolls, railways and other ways, bridges, " ferries." I need go no further into the history of this catalogue than to say that with some additions it goes back for nearly one hundred and fifty years. During the whole of that time there can have been no more familiar feature of the landscape than pits of sand or gravel or clay and I cannot doubt but that during that time and before it the owners of such pits have been accustomed in greater or less degree to exploit them not only for their own use but by profitable sales. Yet it is suggested that the legislature, while expressly including in the catalogue such comparatively rare concerns as alum mines or works and salt springs or works, yet left to the precarious embrace of the expression " other concerns of the like nature " the commonplace operations which it is now sought to tax. Nor does the matter rest there. For the catalogue which I have recited follows immediately after r. 1, which deals with quarries of stone, slate, limestone, or chalk, and r. 2, which deals with mines of coal, tin, lead, copper, mundic, iron, and other mines. Here, surely, would be the appropriate setting in which, had the legislature so intended, pits of sand or gravel or clay should eo nomine have been placed or included by words of general description. I cannot bring myself to suppose that the legislature either overlooked what almost obtrudes itself on the eye of any observer, or, observing it, deliberately refrained either from mentioning it or from putting it in its proper place. I am brought back, then, to the maxim that I have mentioned. For it appears to me that here is a case in which the subject is entitled to say that the words of the section under which it is sought to tax him do not do so with the clarity which the subject matter demands.

What I have said applies equally to gravel pits and to sandpits and it follows that in my view *Mosley's* case (1) was wrongly decided. The argument of the learned Attorney-General was properly founded on that decision. I must, therefore, observe on it that, while Scott L.J. rested his judgment on the view (2) that " the generic words should . . . . be interpreted

(1) 173 L. T. 24; 27 Tax Cas. 315.

(2) 173 L. T. 24, 26; 27 Tax Cas. 315, 323.

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" widely, and as disclosing an express intention of Parliament " to sweep into the net every concern of the general character " I have endeavoured to describe above," du Parcq L.J. (1) disclaimed this view and found in a sand-pit a concern of a like nature to two of the particular concerns included in the catalogue, viz.: salt works and alum mines. Your Lordships have not the advantage of knowing the opinion of Uthwatt J. on this point.

My Lords, I agree with du Parcq L.J. in thinking that the general proposition of Scott L.J. cannot be sustained. In the first place, I think, with great respect, that he ignores that No. III in sch. A comprises exceptions to the general rule which is to be found in No. I. What is not covered by the language of No. III falls within No. I if it is within sch. A at all and does not fall within the other exceptions, and there is no need to give to No. III a wider meaning than, construed as a taxing statute, it strictly requires. Secondly, I cannot accept what I understand to be the view of Scott L.J. as to the generic conception of the specified concerns, viz. (2), that they have the " common " feature of a variable economic yield which makes the rackrent " an untrue or impracticable measure of annual value, and " . . . . their dissimilarity to . . . . the 'normal' use of " land." It is not, I think, open to the House after the decision in *Fry* v. *Salisbury House Estate, Ld.* (3), to say that if a " concern " satisfies these two conditions it must necessarily fall within r. 3 of No. III. Nor, apart from that decision, should I be prepared to accept such a proposition. For, if these two conditions constituted the difference between the cases falling within No. I and No. III, I see no necessity for segregating the items in r. 1 from those in r. 3 nor indeed for any catalogue at all.

Nor, my Lords, can I accept the view expressed by du Parcq L.J. that a gravel pit is a concern of like nature to alum mines or salt springs and therefore within r. 3. I would doubt whether, where a list is followed by such general words as " concerns of like nature," it is proper to regard as covered by those words concerns which have a likeness to one or two of the items but do not exhibit a characteristic common to them all. But, however this may be, I cannot find a sufficient likeness to the items chosen by du Parcq L.J. to justify the inclusion of

(1) 173 L. T. 24, 29; 27 Tax Cas. 315, 327.

(2) 173 L. T. 24, 27; 27 Tax Cas. 315, 323.

(3) [1930] A. C. 432.

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concerns which, if they had been intended to be included, would surely themselves have been selected as examples. In this connexion I refer to my earlier observations and reinforce them by reference to the case of *Edmonds* v. *Eastwood* (1), which appears not to have been called to the attention of the Court of Appeal in *Mosley's* case (2). In that case, which was decided ninety years ago and has never, so far as I am aware, been criticized, Pollock C.B. used these words (3): " I entertain " considerable doubt—indeed more than a doubt—whether " brickfields are to be treated as coal mines or salt works or " any of those matters specifically mentioned in the Rules to " Schedule A No. III . . . . With the public notoriety that " property of that description exists to a great extent, " especially in the neighbourhood of London, it seems almost " impossible, if it was intended to include it, that it should not " have been inserted by name in the same category as coal " mines or salt works " and again : " My opinion is that the " case of a brickfield was not intended to be included within " No. III." In this view Watson B. expressly concurred (4). Martin B. observed (5) that he concurred with the Lord Chief Baron that there was considerable doubt whether this was so —i.e., whether a brickfield fell within r. 3 of No. III : he appears to have underestimated the force of the Lord Chief Baron's conviction. Channell B. (6) doubted whether the case fell within No. I or No. III.

My Lords, I do not think that your Lordships would be justified in disregarding these expressions which have gone so long unchallenged upon the meaning and effect of a taxing statute, even if they did not wholly commend themselves. But, for myself, there is in them not only the force of almost venerable authority but also compelling reason. I would dismiss this appeal accordingly.

I must finally say a few words about the so-called cemetery cases which begin with the *Edinburgh Southern Cemetery Co.* v. *Kinmont* (*Surveyor of Taxes*) (7). Your Lordships are not, I think, called on to review the correctness of these decisions. In the cited case Lord President Inglis, without giving any further reason, said (8) that it appeared to him that the

(1) 2 H. & N. 811.
(2) 173 L. T. 24; 27 Tax Cas. 315.
(3) 2 H. & N. 811, 818.
(4) Ibid. 825.
(5) Ibid. 821.
(6) Ibid. 828.
(7) 17 R. 152; 2 Tax Cas. 516.
(8) 17 R. 152, 163; 2 Tax Cas. 516, 528.

cemetery company there under consideration fell " very fairly " within the words 'other concerns of the like nature,' as " occurring in that rule." Lord Shand said (1) that the true solution of the question was to be found in the fact that " all " of these different concerns relate to companies which, having " purchased or acquired land, remain in the occupation and " use of that land themselves, and are using it for the purpose " of some trade or business whereby they acquire profits." I do not think that the learned judge is here laying any stress on companies as distinguished from natural persons, but I would respectfully suggest that, if he meant that all companies or persons, which satisfy the test that he indicates, at once come within r. 3 of No. III, the proposition is far too wide. It may well be that, if the matter came to be argued before your Lordships, there would be found some common characteristic which would justify the inclusion of cemetery companies in the rule. Remembering the high authority of Lord President Inglis, I am not disposed without argument to decide the contrary. But in this case I do not feel called upon either to attempt a definition of the class which r. 3 embraces or to do more than reject the contention of the Inland Revenue that they have established that a sand-pit is a concern " of like " nature " to the concerns enumerated in r. 3 of No. III or to any one or more of them.

LORD NORMAND. My Lords, I concur in the two speeches which have been delivered by my noble and learned friends.

LORD OAKSEY. My Lords, I agree that the judgment of the Court of Appeal in Northern Ireland is right and should be affirmed. The question is whether the respondent in the way in which he dealt with a sand-pit on his farm was carrying on a concern of the like nature with the concerns referred to in r. 3 of No. III of sch. A. I agree with your Lordships that there was evidence upon which the commissioners could find that the respondent was carrying on a concern. The question remains whether it was a concern of a like nature to the other concerns mentioned in r. 3. On this question I agree with the observations of my noble friend, LORD SIMONDS, on the maxim of income tax law that the subject is not taxed unless the words of the taxing statute unambiguously impose the tax upon him.

It has been argued by the Attorney-General for Northern

(1) 17 R. 152, 164; 2 Tax Cas. 516, 528, 529.

Ireland that No. III of sch. A should be construed to include all concerns connected with land which are in their nature commercial, and which produce varying profits, that the characteristic suggested by the respondent's counsel, namely, extraction of part of the soil, is inconsistent with the inclusion of salt springs and alum mines in r. 3 and further is unconnected with any reason for treating such concerns differently from any other concern connected with the land. It was also suggested that No. I dealt with the agricultural uses of land and No. III with all other uses. I am unable to accept these arguments. I do not think the interpretation of such provisions as sch. A, Nos. I and III can be approached in this general way. It may be that it would have been perfectly reasonable to tax every profit arising from land, other than agricultural profit, in a different way from agricultural profit, but it is necessary to consider the words used and the frame of the schedule.

Schedule A provides by No. I:

> " *General Rule for estimating the annual value of Lands,*
> " *Tenements, Hereditaments or Heritages.*
>
> " In the case of all lands, tenements, hereditaments or " heritages capable of actual occupation, of whatever " nature, and for whatever purpose occupied or enjoyed, " and of whatever value (except the properties mentioned " in No. II and No. III of this schedule), the annual " value shall be understood to be: (1.) The amount of the " rent by the year at which they are let, if they are let " at a rackrent and the amount of that rent has been fixed " by agreement within the period of seven years preceding " April 5 next before the time of making the assessment; " or (2.) If they are not let at a rackrent so fixed, then the " rackrent at which they are worth to be let by the year."

Number III is one of the exceptions and everything not dealt with in the exceptions must fall within the general provisions of No. I. No. I is not confined to agricultural uses of land, but refers to all uses except those in Nos. II and III. Number III, r. 1, I think, deals with quarries and r. 2 with mines exhaustively with the single exception of alum mines, and it is conceded that sand-pits are not included in rr. 1 or 2. Now, the digging of sand, gravel, clay or peat are and have been from time immemorial ordinary and well-known uses of land, and it is, in my view, impossible to construe r. 3, which deals expressly with a variety of subjects, none of which bears anything like such a close resemblance to digging for sand as do the subjects dealt with expressly in r. 1, as including sand-pits merely because alum mines are included in r. 3. The reason why such subjects as sand-pits were omitted from the list in No. III (though it is not for the courts to find a reason) was, I imagine, because the concern of using a sand-pit or the like was considered to be an ordinary use of land. In any event sand-pits are not expressly referred to in No. III and to bring them in under such words as "other concerns of the like nature" in r. 3 appears to me to be an unjustifiable extension of general words in an exception. For my own part, I am not at present prepared to hold that it is necessary to find a category to which all the subjects enumerated in r. 3 belong, and that concerns of a like nature must fall within that category, but in my opinion digging sand is not of a like nature to any of the enumerated subjects, having regard to the context of rr. 1 and 2 in which r. 3 occurs. Apart from these reasons of construction, I think it is not unimportant that as long ago as 1858 in the case of *Edmonds* v. *Eastwood* (1) Pollock C.B. and Martin and Watson BB. all expressed the view that No. III did not include digging for clay. This case does not appear to have been cited to the Court of Appeal in England, in the case of *Mosley* v. *George Wimpey & Co., Ld.* (2), where it was held that the extraction of gravel for commercial purposes was a concern within No. III. For the reasons which I have given, that case must, in my opinion, be overruled. I cannot agree with the view of Scott L.J. that the widest possible interpretation ought to be given to the exceptions contained in No. III, nor can I agree with du Parcq L.J., as he then was, in holding that digging of gravel is a concern of a like nature with alum mines.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Rising & Ravenscroft for William J. G. Seeds, Limavady, Northern Ireland.*

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(1) 2 H. & N. 811.

(2) 173 L. T. 24; 27 Tax Cas. 315.

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May 3, 4, 6;
June 23.

[HOUSE OF LORDS.]

AMALGAMATED ANTHRACITE COLLIERIES LIMITED . . . APPELLANTS;

AND

WILDS . . . . RESPONDENT.

SAME . . . . APPELLANTS;

AND

SAME . . . . RESPONDENT.

SAME . . . . APPELLANTS;

AND

JEREMIAH . . . . . . RESPONDENT.

Workmen's compensation—Partial incapacity by accident—Further partial incapacity by industrial disease—Assessment of compensation—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 3 *; s.* 43 *; s.* 47, *sub-s.* 1 (*b*).

When a workman, already partially incapacitated by an accident, actual or notional, and in receipt of workmen's compensation in respect of that incapacity, is afterwards further incapacitated by an industrial disease or an illness which is the subject of a statutory scheme, his pre-accident earnings, for the purpose of calculating compensation in respect of the second incapacity, are those which he was earning or was able to earn after his first injury.

Evans v. *Oakdale Navigation Collieries, Ld.* [1940] 1 K. B. 702 overruled.

Decision of the Court of Appeal (sub nom. *Wilds* v. *Amalgamated Anthracite Collieries Ld. Same* v. *Same. Jeremiah* v. *Same*) (177 L. T. 192; 40 B. W. C. C. 107) reversed.

CONSOLIDATED APPEALS from the Court of Appeal (Scott, Morton and Somervell L.JJ.).

The respective arbitrations were heard in the Llanelly county court and the Ammanford county court and the appeals therefrom were heard together in the Court of Appeal. The facts, stated by LORD PORTER, were as follows:

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* *Present:* LORD PORTER, LORD SIMONDS, LORD DU PARCQ, LORD NORMAND and LORD OAKSEY.

AMALGAMATED ANTHRACITE COLLIERIES LIMITED *v.* WILDS.

SAME *v.* SAME.

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AMALGAMATED ANTHRACITE COLLIERIES, LD.
v.
WILDS.

SAME
v.
SAME.

SAME
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In the Llanelly county court the following facts were established in respect of the respondent Wilds: (*a*) He had worked for the appellants as an underground worker since 1937. (*b*) On June 14, 1944, the certifying surgeon (Dr. John R. Smith) certified that Wilds, who was then thirty-five years of age, was suffering from miner's nystagmus and was thereby disabled from earning full wages, and that the disablement commenced on June 13, 1944. (*c*) He ceased work on June 13, 1944. His average weekly earnings for the twelve months before this date were 7*l*. 10*s*. and he was paid weekly compensation for miner's nystagmus at the rate of 1*l*. 10*s*., together with supplementary allowances on the basis of total incapacity as from June 13, 1944. (*d*) On December 8, 1944, Wilds, whilst still totally disabled by miner's nystagmus and whilst still receiving full compensation for that incapacity, was examined by the medical board appointed under the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931–1943, and on December 18, 1944, the medical board certified that he was suffering from pneumoconiosis, a disease coming within the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, and s. 47 of the Workmen's Compensation Act, 1925, and suspended him as and from December 8, 1944, from all processes specified in para. 2 of the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943. The medical board further certified that the disease was in an early stage and that he was fit for moderately heavy work. (*e*) On January 10, 1945, he was examined by Dr. Joseph Harvey, who certified that he had recovered to some extent from miner's nystagmus and that he was fit for light work on the surface as and from January 10, 1945, but the appellants, perhaps unaware of his partial recovery, continued to pay full compensation for miner's nystagmus until November 10, 1945. (*f*) As and from November 11, 1945, he received from the appellants compensation on the basis of partial incapacity in respect of the miner's nystagmus at the rate of 1*l*. 5*s*. 6*d*. per week, plus supplementary allowances. The weekly earnings which he was deemed to be able to earn as a partially disabled workman were agreed at 4*l*. 3*s*. 0*d*. In respect of his partial incapacity due to miner's nystagmus Wilds was entitled to receive and received by way of compensation half the difference between the said sums of 7*l*. 10*s*. 0*d*. and 4*l*. 3*s*. 0*d*., limited to a maximum of 1*l*. 10*s*. 0*d*. per week, together with supplementary allowances. (*g*) In respect of his partial incapacity due to pneumoconiosis he did not receive any weekly payment as compensation from the appellants, who maintained that, as his earning capacity was not reduced by the second disability, he was entitled to no further sum in compensation. In reliance upon the facts established and the relevant legal provisions there were made two separate and independent claims: (*a*) A claim for compensation on the basis of partial incapacity by the respondent Wilds for disablement by miner's nystagmus from November 10, 1945, based on a certificate of the certifying surgeon dated June 14, 1944, as to a disablement certified to have commenced on or about June 13, 1944; (*b*) A claim for compensation on the basis of partial incapacity by the respondent Wilds for disablement by pneumoconiosis from January 11, 1945, based on a certificate dated December 18, 1944, by the medical board appointed under the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931–1943, as to a disablement certified to have commenced on or about December 8, 1944, on which date the respondent Wilds was suspended from all processes specified in the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, on account of pneumoconiosis, a disease coming within the last-mentioned scheme and s. 47 of the Workmen's Compensation Act, 1925. On July 23, 1946, the learned judge gave his award and ordered that the appellants should pay to the respondent Wilds weekly the sum of 1*l*. 10*s*. together with supplementary allowances on the basis of partial incapacity as compensation in respect of miner's nystagmus suffered by him on June 13, 1944, and that the said weekly payment should commence as from November 11, 1945, and continue during the total or partial incapacity of the said respondent for work or until the same should be ended, diminished, increased or redeemed in accordance with the provisions of the Workmen's Compensation Acts and also that an additional 1*l*. 10*s*. per week together with supplementary allowances should be paid by the appellants to the respondent Wilds in respect of pneumoconiosis on the basis of partial incapacity from January 11, 1945, and be continued during the said incapacity or until the same should be ended, diminished, increased or redeemed in accordance

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with the provisions of the Workmen's Compensation Acts. Upon appeal the Court of Appeal approved these awards. From their judgment an appeal was brought before the House of Lords in respect of each award.

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The respondent Jeremiah was employed by the appellants as a coal miner and on May 24, 1943, he was certified to be disabled by miner's nystagmus. He was paid weekly compensation in respect of such disablement, at first on the basis of total incapacity and, as from the time when he partially recovered, on the basis of partial incapacity. On May 14, 1945, when partially disabled by miner's nystagmus, the respondent Jeremiah was certified to be partially disabled by silicosis, being suspended from working in all processes specified in the Various Industries (Silicosis) Schemes, 1931–39, as from April 21, 1945. The average weekly earnings of the respondent Jeremiah before his first notional accident were agreed at 6*l.* 16*s.* 8*d.* The average weekly amount which he was able to earn by reason of his incapacity due to nystagmus was, by agreement, assessed at 4*l.* 3*s.* 0*d.* The average weekly amount which he was able to earn by reason of his incapacity due to silicosis was, by agreement, assessed at 4*l.* The respondent Jeremiah had not been employed at any time since he was certified to be disabled by miner's nystagmus. Compensation at the rate of 19*s.* 4*d.* per week together with supplementary allowances was paid by the appellants to the respondent Jeremiah in respect of his partial incapacity from miner's nystagmus as from December 26, 1944, and no compensation was paid in respect of his disablement by silicosis. On August 7, 1946, the respondent Jeremiah filed in the Ammanford county court an application for arbitration claiming increased weekly compensation on the basis of partial incapacity in respect of his disablement by miner's nystagmus and weekly compensation on the basis of total or, in the alternative, partial incapacity in respect of his disablement by silicosis. The respondent Jeremiah succeeded in the county court and that decision was upheld in the Court of Appeal. The appellants appealed to the House of Lords.

H. Edmund Davies K.C. and *G. Owen George* for the appellants. From the inception of the workmen's compensation legislation in 1897 the kernel of it has been, and it still is, that

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it is not compensation for personal injury by accident simpliciter but that it is compensation for loss or diminution of earning power resulting from that personal injury. This is a fundamental principle. The statutory provisions for calculating the amount of compensation cannot restrict or enlarge the right to compensation and no code under the Acts can exclude their basic principles. From the basic principle just enunciated it follows that if there is no loss or diminution of earning power no compensation is payable (although the workman may be granted a declaration of liability) whether the fact be that there were no pre-accident earnings or earning capacity or that the accident has left the earning capacity unimpaired. If there has been a loss or diminution of earning capacity, the workman must connect it with a particular injury by accident; the effect must be attributed to a particular cause. If he does connect it with a particular accident he cannot be heard to say that the same loss or diminution is due to another unconnected accident. In the present case the effect of the decision of the Court of Appeal has been to give each of the respondents in respect of his second industrial disease a solatium which puts him in a better position than he was before and that is outside the powers of the Act. Although the respondent Wilds has suffered no loss of earnings through his second disease and the respondent Jeremiah very little, each nevertheless, in the result, receives double compensation. The compensation so awarded was based, not on the amount of earnings actually lost by the second disease, but on the earnings which it was assumed the respondents would or might have lost if they had not been of impaired earning capacity, which in fact was not the case. *Bacon* v. *A. W. Wills & Sons, Ld.* (1); *Cole* v. *Amalgamated Anthracite Collieries, Ld.* (2) and *Evans* v. *Oakdale Navigation Collieries, Ld.* (3) were wrongly decided. In particular, if the last named decision be right *Wheatley* v. *Lambton, Hetton & Joicey Collieries, Ld.* (4) cannot be right, for the two cannot be reconciled. In the latter case the argument presented for the workman was the same as in the present case. Alternatively those three cases are distinguishable from the present case and are not decisive of the problem here. *Bacon* v. *A. W. Wills & Sons, Ld.* (1), which was not dealing with successive accidents at all, is also distinguishable from *Evans* v. *Oakdale Navigation Collieries, Ld.* (3). In the Act of 1925, s. 43 is not dealing expressly with successive accidents.

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(1) [1933] 2 K. B. 493.

(2) (1933) 26 B. W. C. C. 560.

(3) [1940] 1 K. B. 702.

(4) [1937] 2 K. B. 426.

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Paull K.C., *T. Jenkin Jones* and *Ian Black* (*Gerwyn Thomas* with them) for the respondents. The respondents are entitled to weekly compensation in respect of two concurrent partial incapacities from two disablements, as each disease and the disablement caused thereby constitutes separately a personal injury by accident arising out of and in the course of their employment. There is no question but that personal injury by a notional accident was occasioned in both cases and that it arose out of and in the course of the respondents' employment. There are two different accidents, two different injuries and two incapacities in each case. Each incapacity affects a different type of work. Thus, in the case of the respondent Wilds, taking the case of either incapacity, he can earn 4*l.* 3*s.* 0*d.* a week, if he can get the work, but the labour market is definitely narrowed for him by each accident. Miner's nystagmus and pneumoconiosis each narrow the market but in a different way; it is a different market. Therefore it is fallacious to say that he has suffered no further loss of capacity for work by reason of the second accident and an incapacity for work has resulted in each case. The crucial question is whether the capacity to work has been reduced by the second accident. If it has not the respondents must fail; if it has they are past the first obstacle. The average weekly earnings on which the weekly compensation is payable to each respondent, in respect of his second disablement, are to be computed by reference to his employment which gave rise to the disease and not to the twelve months immediately preceding that disablement. The second accident is notional and so under cl. 8 of both the Various Industries (Silicosis) Scheme, 1931, and the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, compensation is to "be claimed and recoverable from the employer "who last employed the workman in the processes" and under cl. 9 (3.) "in the application of the . . . . provisions of the "Act the amount of compensation shall be calculated with "reference to the earnings of the workman under the employer "from whom compensation is recoverable under the Scheme." Similar words occur in s. 43, sub-s. 1 (*d*) of the Workmen's Compensation Act, 1925. It means that in the case of any of the diseases which are the subject-matter of Schemes the relevant pre-accident wages are those which the workman obtained from his last employer in work to which the Scheme applies, viz., the average in the twelve months before the last period at which the workman had been employed in the process

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and not of his wages after the first accident: see *Evans* v. *Oakdale Navigation Collieries, Ld.* (1); *Cole* v. *Amalgamated Anthracite Collieries, Ld.* (2) and *Bacon* v. *A. W. Wills & Sons, Ld.* (3). This case is stronger than *Evans* v. *Oakdale Navigation Collieries, Ld.* (1). Under the Schemes the employer in question may not have employed the workman for some five years and he may have sustained any number of accidents before he is certified. Accordingly the relevant pre-accident wage is that paid by the employer on whom falls the duty to compensate him. *Wheatley* v. *Lambton, Hetton and Joicey Collieries, Ld.* (4) is not relevant. [They referred to *Bevan* v. *Nixon's Navigation Co., Ld.* (5); *Doudie* v. *Kinneil Cannel & Coking Coal Co., Ld.* (6); *Harwood* v. *Wyken Colliery Co.* (7); *Richards* v. *Goskar* (8); *Walden* v. *Mono Concrete Co., Ld.* (9); *Ball* v. *William Hunt & Sons, Ld.* (10) and *M'Cann* v. *Scottish Co-operative Laundry Association, Ld.* (11).]

H. Edmund Davies K.C. in reply. The contention of the respondents is contrary to the consistent judicial interpretation of the Acts for the last fifty years. As to the narrowing of the market for the respondents' labour, that does not necessarily cut down their earning power. *Doudie* v. *Kinneil Cannel & Coking Coal Co., Ld.* (12) dealt with a different point from the present. *Richards* v. *Goskar* (8) does not support the respondents. [He referred to *Harwood* v. *Wyken Colliery Co.* (13).]

THE HOUSE took time for consideration.

LORD PORTER. My Lords, these three appeals raise the same point. The arbitrations upon which they depend were heard successively in the county court and the appeals from the award there given were heard together in the Court of Appeal. The question at issue concerns the amount to be awarded to a workman who is partially incapacitated by an accident, actual or notional, and afterwards is further incapacitated by an industrial disease or by illness which is the subject of a statutory Scheme. The problem is to determine whether the pre-

(1) [1940] 1 K. B. 702.
(2) 26 B. W. C. C. 560.
(3) [1933] 2 K. B. 493.
(4) [1937] 2 K. B. 426.
(5) [1929] A. C. 44.
(6) [1947] A. C. 377, 384.
(7) [1913] 2 K. B. 158.
(8) [1937] A. C. 304.
(9) [1943] K. B. 683.
(10) [1912] A. C. 496.
(11) 1936 S. C. (H. L.) 12; 29 B. W. C. C. 1.
(12) [1947] A. C. 377.
(13) [1913] 2 K. B. 158, 165.

accident wages in the case of the second accident are to be considered to be those which the workman was earning before his earlier injury or those which he was earning or able to earn after the injury in respect of which he first received compensation.

Had the respondent Wilds been the victim of two actual successive accidents instead of two notional accidents, for the first of these accidents he would have received half the difference between the wages he was earning before the first accident when he was of full working capacity and what he was able to earn as an injured man after it, but limited of course to the maximum sum payable. For the second accident he would receive half the difference between the earning capacity as an injured man before the second accident and his diminished capacity to earn as a further injured man after the second accident. If, however, as is the fact in the present case, his earning capacity was not impaired by the second accident he would receive no further compensation in respect of that accident. These results follow from the wording of s. 1, sub-s. 1 and s. 9, sub-s. 3 (i.), of the Workmen's Compensation Act, 1925, viz.: Section 1, sub-s. 1 "If in any employment personal injury by accident arising out "of and in the course of the employment is caused to a work-"man his employer shall, subject as hereinafter mentioned, "be liable to pay compensation in accordance with the pro-"visions hereinafter contained . . . ." Section 9, sub-s. 3: "The rules for calculating the weekly payment in the case of "partial incapacity shall be—(i.) If the maximum weekly "payment would, had the incapacity been total incapacity, "have amounted to twenty-five shillings a week or upwards, "the weekly payment in case of partial incapacity shall be one-"half the difference between the amount of the average weekly "earnings of the workman before the accident and the average "weekly amount which he is earning or is able to earn in some "suitable employment or business after the accident." They are supported by the authority of *Harwood* v. *Wyken Colliery Co.* (1); *Thompson* v. *L. & N. E. Ry. Co.* (2) and *Wheatley* v. *Lambton, Hetton and Joicey Collieries, Ld.* (3), approved in your Lordships' House in *Doudie* v. *Kinneil Cannel Coking Coal Co., Ld.* (4). Indeed the matter is not in dispute. But it is said that the position is altogether different in the case of an industrial disease or of disablement by exposure to certain

(1) [1913] 2 K. B. 158.
(2) [1935] 2 K. B. 90.
(3) [1937] 2 K. B. 426.
(4) [1947] A. C. 377.

conditions which are the subject of Schemes set up under the provisions of the Act. The relevant sections of the Act are portions of s. 43 and sch. III, as extended by the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (St. R. & O. 1929, No. 2), s. 47, sub-s. 1 (*b*) and s. 1, sub-ss. 1 and 3, of the Workmen's Compensation Act, 1943. They read as follows:

WORKMEN'S COMPENSATION ACT, 1925.

Section 43. "(1.) Where—(i.) the certifying surgeon "appointed under the Factory and Workshop Act, 1901, for "the district in which a workman is employed certifies that "the workman is suffering from a disease mentioned in the "Third Schedule to this Act and is thereby disabled from "earning full wages at the work at which he was employed; ". . . . and the disease is due to the nature of any employ"ment in which the workman was employed at any time within "the twelve months previous to the date of the disablement "or suspension . . . . he . . . . shall be entitled to com"pensation under this Act as if the disease or such suspension as "aforesaid were a personal injury by accident arising out of "and in the course of that employment, subject to the following "modifications: (*a*) The disablement or suspension shall be "treated as the happening of the accident; (*c*) The "compensation shall be recoverable from the employer who "last employed the workman during the said twelve months "in the employment to the nature of which the disease was "due; . . . . (*d*) The amount of the compensation shall be "calculated with reference to the earnings of the workman "under the employer from whom the compensation is "recoverable . . . . (2.) For the purposes of this section the "date of disablement shall be such date as the certifying surgeon "certifies as the date on which the disablement commenced, "or, if he is unable to certify such a date, the date on which "the certificate is given . . . ."

"*Third Schedule.*

"*Description of Disease or Injury.*—19. The disease known "as miner's nystagmus, whether occurring in miners or others, "and whether the symptom of oscillation of the eyeballs be "present or not. *Description of Process.*—Mining."

Section 47, sub-s. 1: "The Secretary of State may by "scheme provide for the payment of compensation by the

" employers of workmen in any specified industry or process " or group of industries or processes involving exposure to " silica dust . . . . (*b*) who, though not totally disabled, are " found on medical examination to be suffering from silicosis, " or from silicosis accompanied by tuberculosis, to such a " degree as to make it dangerous to continue work in the " industry or process, and are for that reason suspended from " employment."

WORKMEN'S COMPENSATION ACT, 1943.

Section 1 : " (1.) Section 47 of the Workmen's Compensation " Act, 1925 (which as amended by the Workmen's Com- " pensation (Silicosis and Asbestosis) Act, 1930, provides for " the making of schemes applying that Act to workmen " suffering from fibrosis of the lungs due to silica dust or " asbestos dust) shall extend to workmen suffering from any " form of pneumoconiosis ; . . . . (3.) This section shall not " affect the validity of any scheme made under the said s. 47 " . . . . which is in force at the passing of this Act, and any " such scheme made under the said s. 47 shall have effect as if " it had been made under that section as amended by the " Schedule to this Act . . . ."

The two relevant schemes are the Various Industries (Silicosis) Scheme, 1931 (St. R. & O. 1931, No. 342) and the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943 (St. R. & O. 1943, No. 885) the material provisions of these two schemes are in the form set out below :

THE VARIOUS INDUSTRIES (SILICOSIS) SCHEME, 1931.

" 4. Where the Medical Board certify . . . . (3.) that a " workman, though not totally disabled, is suffering from " silicosis or from silicosis accompanied by tuberculosis to such " a degree as to make it dangerous for him to continue work in " the processes, and is for that reason suspended from employ- " ment ; and where the disease is due to employment in the " processes whether under one or more employers, the workman " or his dependants, as the case may be, shall be entitled to " claim compensation as if the disease as aforesaid were a " personal injury by accident arising out of and in the course " of that employment, as provided by the Act, but subject to " the modifications hereinafter contained . . . .

" 6. For the purposes of this Scheme the date of the injury " shall be deemed to be the date on or from which the workman " is certified to be totally disabled or, while not totally disabled, " is suspended from employment . . . .

" 8. (1.) The compensation shall be claimed and recoverable " from the employer who last employed the workman in the " processes . . . .

" 9. . . . . (2.) In cases of suspension due to silicosis or " silicosis accompanied by tuberculosis where the workman is " not totally disabled—(*a*) if the Medical Board certify that " the workman's general physical capacity for employment is " impaired by reason of the disease, the workman shall be " entitled, while impairment continues, to a weekly payment " fixed in accordance with the provisions of the Act for fixing " the compensation in cases of partial incapacity . . . . " (3.) In the application of the aforesaid provisions of the Act " the amount of compensation shall be calculated with reference " to the earnings of the workman under the employer from " whom compensation is recoverable under this Scheme."

THE COAL MINING INDUSTRY (PNEUMOCONIOSIS) COMPENSATION SCHEME, 1943.

" 4. Where the Medical Board certify . . . . (3.) that a " workman, though not totally disabled, is suffering from " pneumoconiosis or from pneumoconiosis accompanied by " tuberculosis to such a degree as to make it dangerous for " him to continue work in the industry or in any operation or " work in the industry and is for that reason suspended from " employment; and where the disease is due to employment " in the industry whether under one or more employers, the " workman or his dependants, as the case may be, shall be " entitled to claim compensation as if the disease as aforesaid " were a personal injury by accident arising out of and in the " course of that employment, as provided by the Acts, but " subject to the modifications hereinafter contained . . . .

" 6. For the purposes of this Scheme the date of the injury " shall be deemed to be the date on or from which the workman " . . . . is suspended from employment in the industry or in " any operation or work in the industry, as the case may be . . . .

" 8. (1.) The compensation shall be claimed and recoverable " from the employer who last employed the workman in the " industry . . . .

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"9. . . . . (2.) In cases of suspension due to pneumoconiosis "or pneumoconiosis accompanied by tuberculosis where the "workman is not totally disabled: (*a*) if the Medical Board "certify that the workman's general physical capacity for "employment is impaired by reason of the disease, the work-"man shall be entitled, while impairment continues, to a weekly "payment fixed in accordance with the provisions of the Acts "for fixing the compensation in cases of partial incapacity ". . . . (3.) In the application of the aforesaid provisions of "the Acts the amount of compensation shall be calculated with "reference to the earnings of the workman under the employer "from whom compensation is recoverable under this Scheme."

Upon appeal the Court of Appeal approved the awards, but, so far as two of the Lords Justices were concerned, only, I think, because they felt bound by the authority of *Evans* v. *Oakdale Navigation Collieries, Ld.* (1). From their judgment this appeal is brought before your Lordships' House. Like the Lords Justices, I think the principles set out in that case govern the present appeal, and your Lordships have accordingly to determine whether that decision is right. Whilst the workman was totally disabled by nystagmus no claim was made for the further injury by pneumoconiosis. He was already totally incapacitated and there was therefore no capacity left which could be taken away by the second injury. Accordingly, the principle adopted in *Wheatley* v. *Lambton, Hetton and Joicey Collieries, Ld.* (2) was accepted and until there was partial recovery from the nystagmus the compensation payable for that disability was not sought to be increased, though the workman had suffered a further notional injury by accident as a result of the pneumoconiosis. But once he had recovered from the nystagmus a claim was made to receive compensation for partial loss of earning power brought about by the nystagmus and also compensation for total loss of earning power due to the pneumoconiosis. The argument, as I understood it, was similar to that employed in *Evans* v. *Oakdale Navigation Collieries, Ld.* (1). The miner, it was said, suffers from nystagmus causing a loss of earning power. That loss which originally was total has now become partial and for it the workman is rightly receiving the appropriate amount of compensation fixed in accordance with the terms of the Act and recoverable so long as the incapacity remains. The appel-

(1) [1940] 1 K. B. 702.

(2) [1937] 2 K. B. 426.

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lants do not dispute this contention but part company with the respondent on his further argument when he maintained that as the respondent suffers from pneumoconiosis as well as nystagmus he is entitled to compensation for both, none the less though his earning power has not been reduced. Admittedly if the second accident had been what may be described as an actual and not a notional one compensation would be based on his earnings as an injured man, not upon the wages he earned when receiving full wages as a miner: these latter would be irrelevant in ascertaining the loss caused by the second accident. His pre-accident earnings would be those paid to him as an injured man, not those obtained whilst in work as a miner. But where the second disability is a notional one it is contended that, under the provisions of cl. 8 and cl. 9 (3.) of the Scheme, compensation is to "be claimed and recoverable from the "employer who last employed the workman in the processes," and in applying the appropriate provisions of the Act—viz., ss. 8 to 11—"the amount of compensation shall be calculated "with reference to the earnings of the workman under the "employer from whom compensation is recoverable under the "Scheme." This language is said to mean that, in case of silicosis or pneumoconiosis or any of the illnesses which are the subject-matter of Schemes, the relevant pre-accident wages are those which the workman obtained from his last employer in work to which the Scheme applies. "I am unable," said Luxmoore L.J. in *Evans* v. *Oakdale Navigation Collieries, Ld.* (1) "to find any words, either in the Act or in the Scheme, to "suggest that in any case the compensation for total disablement by silicosis is to be calculated with reference to any "average weekly earnings other than those of the workman "under the employer who last employed the workman in the "process in which the notional injury by accident caused by "contracting silicosis arose, or with reference to any want of "capacity other than total incapacity." The cases of *Cole* v. *Amalgamated Anthracite Collieries, Ld.* (2) and *Bacon* v. *A. W. Wills & Sons, Ld.* (3) both dealt with the circumstances of a single notional accident as to which it was held that as the employer to be looked to was the last under whom the workman served in the material process and as the workman might recover compensation though he had not been employed in the process at all for three (now five) years before the notional accident, the relevant pre-accident wages must be the average of the twelve months before the last period at which the workman was so employed and therefore not the pre-accident wages subsisting after the first accident. The argument receives its strongest support from the wording which appears in both Acts (s. 43, sub-s. 1 (*d*)) and Schemes (cl. 9 (3.) of each) viz.: "The "amount of compensation shall be calculated with reference "to the earnings of the workman under the employer from "whom the compensation is recoverable." Under the provisions of the Schemes as they now stand that employer may not have employed the workman for some five years and any number of accidents to the employee may have happened before he is certified or suspended. Accordingly, it is asked, which of the various pre-accident earnings of a man, who has changed his job and whose capacity has been altered by one or more accidents subsequent to his change of employer, is to be taken as the relevant pre-accident wage unless it be that which was paid by the employer upon whom the duty to compensate the workman is imposed?

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(1) [1940] 1 K. B. 703, 713.

(2) 26 B. W. C. C. 560.

(3) [1933] 2 K. B. 493.

Evans v. *Oakdale Navigation Collieries, Ld.* (1) carried the argument a step further and applied the same principle to a case of successive accidents. The question to be determined was what was the pre-accident wage applicable where the workman met with an actual accident and was awarded compensation for it but later was certified as suffering from silicosis. Was the relevant wage in the case of the silicosis that which the workman was earning before his first accident or that which he was earning after that accident and at the time when he was certified as suffering from silicosis? The former was held to be the material time. Slesser L.J. said (2): "Notwithstanding the "actual partial incapacity . . . . the Silicosis Scheme requires "the workman in the circumstances to be assumed to be of "full capacity" and (3): "The legislature . . . . has ordained "that, contrary to natural experience, the injury (the disease) "must be regarded as preceding the accident (the certification)" and Luxmoore L.J. said (4): "There is a material difference "between the case where a workman is, in the first instance, "partially incapacitated by an injury by accident as distinct "from a notional accident by disease and is then rendered "totally incapable by reason of a second accident which is also "not a notional one, and the case where the original partial

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(1) [1940] 1 K. B. 702.

(2) Ibid. 709.

(3) Ibid. 710.

(4) Ibid. 713, 714.

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SAME *v.* JEREMIAH.

Lord Porter.

" incapacity is followed by total incapacity arising from a " notional accident caused by industrial disease. In the former " case the compensation in respect of the second accident, which " resulted in the partial incapacity from the first accident " becoming total incapacity, must on the true construction of " the Act be calculated with reference to the average weekly " earnings immediately preceding the second accident: see " *Harwood* v. *Wyken Colliery Co.* (1) and *Thompson* v. " *L. & N. E. Ry. Co.* (2). Of course, if, as the result of the " first accident, the workman suffers total disability, it matters " not whether he is subsequently certified to be suffering from " an industrial disease which also has rendered him totally " incapacitated, for in such a case there is no capacity for work " on which the notional accident can operate; *Wheatley* v. " *Lambton, Hetton and Joicey Collieries, Ld.* (3). As " Greene M.R. pointed out in the earlier appeal—*Evans* v. " *Oakdale Navigation Collieries, Ld.* (4)—so long as the total " incapacity lasted from the first accident, no compensation " could be recovered in respect of the second accident, although " in respect of the second accident a declaration of liability " might properly be obtained."

Having regard to these authorities and in particular to the decision in *Evans* v. *Oakdale Navigation Collieries, Ld.* (5), the Court of Appeal dismissed the appeal to them, though all three members of that court described the result at which they arrived as wanting in logic. No doubt in a case of successive accidents one would have expected " an inquiry with a view to " allocating the parts of the total reduction which resulted " respectively from the injury caused in each accident," to use Lord Thankerton's words in *Jones* v. *Amalgamated Anthracite Collieries, Ld.* (6), but it is for your Lordships to determine whether in a case where a notional accident follows another, actual or notional, the provisions of this Act and Scheme compel you to hold otherwise. My Lords, I am not sure that I should myself describe the conclusion arrived at as illogical. No doubt in one aspect where an Act prescribes a certain quantum of compensation it is illogical to give it twice over, but the stages by which that result is arrived at are themselves strictly logical, if the view be adopted that a man who is incapacitated by an industrial disease or disease dealt with by a scheme is

(1) [1913] 2 K. B. 158.
(2) [1935] 2 K. B. 90.
(3) [1937] 2 K. B. 426.
(4) (1939) 32 B. W. C. C. 51, 56.
(5) [1940] 1 K. B. 702.
(6) [1944] A. C. 14, 23.

required by the Act to be deemed to be of full capacity whatever his actual circumstances may be when a second and notional accident is met with. So far as the decision in the present case is concerned, I am not disposed to quarrel with the judgment in *Bacon* v. *A. W. Wills & Sons, Ld.* (1), or *Cole* v. *Amalgamated Anthracite Collieries, Ld.* (2). Each was an instance of a single accident: the workman in fact had been of full capacity and had become totally disabled by a notional accident: the only question was whether the pre-accident wage was to be taken to be that immediately preceding that notional accident or that at which he had been remunerated when engaged in working at the "process." No question arose as to whether compensation awarded for a previous accident should be taken into account. The amount of compensation had to be and was calculated with reference to the earnings under the employer from whom compensation was recoverable. But though the calculation is to be made with reference to those earnings neither the Act nor Scheme say that other matters may not be taken into consideration. In the two cases referred to there were no other matters; in the present case the workman was already in receipt of a sum sufficient to compensate him for his loss of wages to the extent which the Act allows. In my view that circumstance should also have been taken into consideration. In no case should the workman receive less than a sum adequate to provide the statutory compensation for his loss, but there is nothing to compel a court to give it twice over.

In general I find myself in agreement with the views held by Morton L.J. (as he then was) and Somervell L.J. and upon which I understand they would have acted had they not been bound by the decision in *Evans* v. *Oakdale Navigation Collieries, Ld.* (3). I should allow the appeal and direct that the respondent pay the appellant costs in your Lordships' House and below.

My Lords, in the case of Jeremiah I have not felt it necessary to prepare a separate opinion. The facts so closely resemble those in the case of Wilds that the same result must follow. From those facts it is apparent that the same principles must apply in Jeremiah's case as those that apply in Wilds' case. The result will be that it will be necessary to work out the exact figures, but the principle upon which your Lordships determine the case is that he is not entitled to the double compensation.

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(1) [1933] 2 K. B. 493.
(2) 26 B. W. C. C. 560.
(3) [1940] 1 K. B. 702.

LORD SIMONDS. My Lords, I have had the opportunity of considering the opinion which my noble and learned friend on the woolsack has just delivered and also that which my noble and learned friend, LORD NORMAND, is about to deliver. I concur so fully in their reasoning and conclusions that I do not propose to add anything myself.

LORD DU PARCQ. My Lords, I have had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend, LORD NORMAND. I agree with it, and join with him in adopting the reasoning of Morton L.J. and Somervell L.J. It may be useful to add that a parallel to that reasoning is to be found in the opinions delivered in this House in *Heathcote* v. *Haunchwood Collieries, Ld.* (1). There it was para. 3 of sch. I to the Act of 1906 which was being considered. That paragraph, like s. 9 of the present Act, used the words "which he" (scilicet, the workman) "is "earning," and thus made the injured workman's actual earnings the basis of the calculation which the arbitrator was required to make. The words "which he is earning" were unqualified. Nevertheless it was held that if a man chose to earn a much smaller wage than he could earn if he were so disposed, his actual earnings must be ignored. This result was arrived at by following the elementary rule of construction which requires the courts to look at an Act as a whole, and to read each section in its context. Section 1 of the Act of 1906 made manifest the intention of the legislature, and a strictly literal construction of the words of para. 3, read without their context, would have defeated that intention. So here, the construction of the material words in s. 43 of the Act of 1925 which it is proposed that your Lordships should adopt is necessary in order to carry out the intention of Parliament. That intention plainly appears from s. 1. It is perhaps well to emphasize the fact that your Lordships are not amending the statute but interpreting it according to a well-known canon. I agree with the motion proposed.

LORD NORMAND. My Lords, I agree that the appeals should be disposed of as my noble and learned friend on the woolsack

(1) [1918] A. C. 52.

has proposed. In the Court of Appeal Morton L.J. and Somervell L.J. held themselves bound, as they undoubtedly were, by *Evans* v. *Oakdale Navigation Collieries, Ld.* (1), but they gave reasons which would have caused them, if they had been free, to decide in favour of the employers, the appellants in these appeals. Their reasoning is, I think, unanswerable; I respectfully adopt what they have said, and I shall only add some observations which are prompted by the argument addressed to your Lordships for the respondents.

Three cardinal rules for construing the Workmen's Compensation Act have been established by decisions of this House: (1.) that the first thing one has to do is to apply one's mind to what is the substantive meaning of the Act; (2.) that the right to compensation which is given by s. 1 is not to be enlarged or diminished by the provisions which prescribe the scale of compensation and the mode and conditions of its enjoyment; and (3.) that by s. 1 compensation is given for loss of earning power through incapacity for work caused by personal injury by accident. In my opinion the respondents' claim was supported by reasons which did violence to each one of these cardinal rules. The basis of it was the direction that in the disease cases the amount of compensation shall be calculated with reference to the earnings of the workman under the employer who last employed him within the twelve months previous to the date of the disablement or suspension in the employment to the nature of which the disease is due. I take these words from s. 43 of the Act, and there are corresponding words in the schemes made under s. 47. Now this direction is solely for the purpose of reckoning the amount of compensation. It was a necessary direction in a section or scheme which assimilated incapacity caused by a progressive disease to incapacity caused by an injury by accident, for s. 9 of the Act, which provides a suitable mode of calculating compensation for loss of earning power resulting from an injury by accident, does not fit a loss of earning power which may not show itself till a considerable time after the uncertain date when the disease began. But the substantive intention of the Act in its application to the incapacity caused by disease, as in its application to incapacity caused by injury by accident, is that the compensation is for loss of earning power. The respondent's claim, however (I take Wilds' claim for simplicity's sake), is for compensation though there has been no loss of earning power caused by the incapacity resulting from the disease in respect of which the claim is made, for the arbitrator's finding is conclusive of the fact that the incapacity resulting from the pneumoconiosis did not prevent Wilds from earning what he was able to earn in an employment suitable to a man already partially incapacitated by nystagmus. Mr. Paull argued that, though the earning power was not affected by the pneumoconiosis incapacity, the field in which Wilds could seek work was narrowed by it. It is true that the range of work is narrower for a man suffering from nystagmus and pneumoconiosis than for a man suffering from nystagmus alone, but, I can only repeat that the Act does not give compensation because the field of employment is narrowed but because the workman's earning power is diminished.

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(1) [1940] 1 K. B. 702.

The direction to calculate the compensation "with reference" to the earnings in the period specified by s. 43 (or by a Scheme made under s. 47) does not mean that the ascertained total of wages received in the specified period is to be substituted simpliciter in the upper line of a subtraction sum for the average weekly wage specified in s. 9. The words "with "reference to" rather require that the provisions of s. 9 shall be moulded, as Lawrence L.J. said in one of the cases, in order to solve the difficulty which comes from artificially assimilating incapacity caused by disease to incapacity caused by ordinary accidents. This mode of construing the statute, which is, I concede, bolder and more free than is permissible when there are no words, such as we have here, or no specialities of implication to authorize it, was successfully resorted to in *Bacon* v. *A. W. Wills & Son, Ld.* (1), *Cole* v. *Amalgamated Anthracite Collieries, Ld.* (2), and *Wheatley* v. *Lambton, Hetton and Joicey Collieries, Ld.* (3); and in *Richards* v. *Goskar* (4), this House found it necessary, in order to make the Act work, to construe s. 43, sub-s. 1 (*a*) as if it were subject to limitations not expressed. In my opinion if the Act is construed as it should be in accordance with the three cardinal rules with which I began and by the method used in the cases which I have just cited the respondents' present claims must fail.

I should add that the ratio of *Wheatley* v. *Lambton, Hetton and Joicey Collieries, Ld.* (3) which was in my view rightly decided, is irreconcilable with *Evans* v. *Oakdale Navigation Collieries, Ld.* (1) and is decisive of the issue in these appeals.

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(1) [1933] 2 K. B. 493.
(2) 26 B. W. C. C. 560.
(3) [1937] 2 K. B. 426.
(4) [1937] A. C. 304.

LORD PORTER. My Lords, my noble and learned friend, LORD OAKSEY, has asked me to say that he concurs in the views which have been expressed.

Appeals allowed, subject to an agreement between the parties as to the compensation properly payable.

Solicitors for appellants: *Botterell & Roche, for Llewellyn & Hann, Cardiff.*

Solicitors for respondents: *John T. Lewis & Woods, for Randell, Saunders & Randell, Llanelly.*

(1) [1940] 1 K. B. 702.

[HOUSE OF LORDS]

H. L. (E.)*
1948
Feb. 3, 4, 5, 6, 9;
July 14.

GOLD COAST SELECTION TRUST LIMITED APPELLANTS;

AND

HUMPHREY (INSPECTOR OF TAXES). RESPONDENT.

Revenue — Income tax — Profits of trade — Company dealing in gold-mining concessions—Concessions sold for shares—Par value equal to price named for sale—Shares not immediately realizable—Valuation —Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. D.*

In 1934 the appellant company which dealt in stocks and shares and exploited and dealt in gold-mining concessions sold a concession to another company, the consideration being expressed to be 800,000*l.* to be paid and satisfied by the issue to the appellant company of shares in the purchasing company of a par value equal to the price named. It did not clearly appear from the evidence that the whole block of shares was capable of realization immediately or within a short time. Assessments to income tax having been made on the appellant company under Case I of sch. D. of the Income Tax Act, 1918, the Commissioners for the General Purposes of the Income Tax found that at the date of the allotment the value of the shares received by it was par, the price agreed to be paid by the purchasing company.

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* *Present:* VISCOUNT SIMON, LORD THANKERTON, LORD UTHWATT, LORD DU PARCQ and LORD OAKSEY.

Held, that the case should be referred back to the commissioners to reconsider and fix the proper figure for the value of the shares on the basis that the figure of 800,000*l.* was not inevitably forced on them by the terms of the agreement taken alone, but that the value was a matter of fact to be determined after taking into account all the relevant circumstances at the time of the transaction.

Per Viscount Simon, Lord Uthwatt and Lord du Parcq, Lord Oaksey dissenting: Where a trader in the course of his trade receives a new and valuable asset, not being money, as the result of sale or exchange, that asset, for the purpose of computing the annual profits or gains arising or accruing to him from his trade, should be valued as at the end of the accounting period in which it was received, even though it be neither realized nor realizable till later.

Decision of the Court of Appeal reversed.

Appeals from the Court of Appeal (Scott, Somervell and Cohen L.JJ.).

The facts, stated by Viscount Simon, were as follows: The appellant company, the Gold Coast Selection Trust, Ld. (hereinafter called " the Trust "), at all material times carried on the trade of a dealer in stocks and shares and an exploiter of and dealer in gold-mining concessions in the Gold Coast Colony. Its practice was to acquire concessions for land considered to have gold-bearing possibilities. Concessions so acquired were exploited by the Trust to the extent necessary for the ascertaining of their potentialities. If a concession was proved to be gold bearing, and if it appeared to the Trust that further development might result in the profitable production of gold, the Trust transferred such concession to a company, the business of which was to work the concessions and market the gold produced. The transferee company was in every case a public company; its directors were drawn from the directorate of the Trust; and the consideration for the transfer of the concession was in each case satisfied by an issue of fully paid-up shares in the transferee company. The shares so issued (hereinafter called " vendor shares ") were of a par value equal to the price named in the agreement for the sale of the concessions as the sale price. Permission to deal in the shares of the transferee companies was, in due course, accorded by the London Stock Exchange in each case, and dealings in these shares in limited quantities in fact took place. The vendor shares issued to the Trust together with other holdings acquired by it were large enough to give the Trust control over the company which was acquiring the concession from it. So large a block of shares could not be readily disposed of in the stock market without killing the market, and there was evidence before the commissioners that the proper way to deal with them, if it was desired to turn the block of shares into cash, would be to approach trust companies or financial houses and endeavour to place them. The evidence was of somewhat ambiguous effect, for while it indicated that a successful operation of this sort might be accomplished in reference to a substantial fraction of the total holding, it was not clearly stated that the whole block could be realized in this way, at any rate within a short time.

Three sales of a concession by the Trust were involved in the first appeal: one, by an agreement made on July 28, 1934, with the Marlu Gold Mining Areas, Ld. (hereinafter called "Marlu"); the second by an agreement made on July 9, 1935, with the Gold Coast Main Reef, Ld.; and the third by agreement made on December 2, 1936, with the Bremang Gold Dredging Co., Ld. The main question of law was the same in all three cases. Taking the Marlu case as an example, Marlu had been incorporated on July 26, 1934, with an authorized capital of 2,000,000*l.* divided into eight million shares at 5*s.* each. The consideration moving from Marlu to the Trust for the sale and transfer of the concession was stated in the agreement of July 28, 1934, to be "the sum of 800,000*l.*, "which shall be paid and satisfied by the allotment and "issue to the vendor or its nominees of three million two "hundred thousand shares of 5*s.* each in the capital of the "purchaser, credited as fully paid up." The purchase was completed and the fully paid shares allotted on November 30, 1934. On July 30, 1934, two days after the agreement, Marlu issued a prospectus offering for subscription at par two million shares of 5*s.* each. The Trust underwrote one million six hundred thousand of these shares at par in consideration of an option to subscribe for one million two hundred thousand shares of 5*s.* each at the price of 6*s.* up to July 31, 1936. The whole of the shares offered were subscribed; the Trust itself took up and paid for ten thousand, five hundred and seventy-nine. The Trust purchased some additional shares in the market, and later bought five hundred and forty-five thousand, nine hundred and thirty-nine shares at 6*s.* under its option. The question was whether fully paid shares acquired under the agreement of July 28 by the Trust, should, for income tax purposes, be valued at any and what figure in money and thus

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enter into the computation of the profits and gains of the Trust for the year ending April 5, 1935, so as to justify a corresponding assessment to income tax for the year ending April 5, 1936. A similar question arose, with a difference in figures and amounts, in the other two cases. The books of the Trust entered the cost to the Trust of the concessions sold to Marlu, viz. 107,875*l.*, as the purchase price for the three million, two hundred thousand fully paid shares allotted under the sale agreement, though obviously when the concession has been proved to be auriferous, its value could not be limited to this. Then, year by year, as shares were sold, the profit on such sales was brought to account.

The second appeal concerned a transaction relating to a concession owned by Anfargah Gold Mines & Finance Co., Ld. (hereinafter called " Anfargah ") in which the Trust owned a block of shares giving it a controlling interest. The concession was subsequently sold to Ariston Gold Mines (1929), Ld. (hereinafter called " Ariston ") for a block of fully paid up shares in that company. Anfargah went into voluntary liquidation and the liquidator was authorized to make a distribution in specie. Under the distribution the Trust received, in respect of its shares in Anfargah, shares in Ariston.

Assessments to income tax were made on the Trust under Case I of sch. D of the Income Tax Act, 1918, for the years ending April 5, 1935, April 5, 1936, April 5, 1937, and April 5, 1938, being respectively the Anfargah assessment, the Marlu assessment, the Main Reef assessment and the Bremang assessment. On appeal to the Commissioners for the General Purposes of the Income Tax for the City of London the Trust contended (inter alia): " (A) that no profit or gain can arise " from a sale of an asset unless the transaction amounts to a " ' realization ' of the asset; (B) that a ' realization ' of an " asset involves its conversion into either cash or assets readily " convertible into cash; (C) that in the case of none of the " transactions in question were the shares issued to the Trust " readily convertible into cash; and accordingly (D) that no " profits or gains arose or accrued to the Trust from the said " transactions or any of them." The Crown contended (inter alia): " (A) that in the circumstances of the case the " sale of a concession for shares was a realization enabling a " fresh starting point to be made and the arising of a trading " receipt; . . . (E) that the shares could not in the absence " of further evidence be treated as having been issued at a

" discount, so they must be deemed to be worth their par value " to the issuing company and to have some corresponding value " to the shareholders ; (F) that the price of the concessions as " agreed between the parties was the par value of the shares ; " . . . . (I) that on the authorities it was a matter for the " commissioners whether or not they accepted the par value " of the shares, this being the basis agreed by the parties on " which the concessions were sold . . . ." The General Commissioners held " (1.) that when the Marlu, Main Reef and " Bremang shares were allotted to the Trust there was a " realization of the assets sold to those companies ; (2.) that at " the date of allotment the value of the shares received by the " Trust was par, the price agreed to be paid by the purchasing " companies ; (3.) that in the case of the Anfargah shares " there was no realization and no taxable profit ; (4.) that the " assessments be adjusted accordingly." Both the Trust and the inspector of taxes, the present respondent, expressed dissatisfaction, the former in respect of the determination regarding the years 1935–6, 1936–7 and 1937–8 and the latter in respect of the determination regarding the year 1934–5. Both parties required a case stated for the opinion of the King's Bench Division of the High Court. Wrottesley J. dismissed the appeal of the Trust and allowed the cross-appeal of the present respondent. The Court of Appeal in each case dismissed the appeal from his decision by the Trust, which now appealed to the House of Lords.

Sir Cyril Radcliffe K.C. and *F. Heyworth Talbot* for the appellants, the Trust. No profits or gains accrued to the appellants from any of the transactions whereby they transferred concessions in consideration of allotments of shares in Marlu, Main Reef or Bremang. For the purposes of the Income Tax Acts a transaction of sale or exchange does not contribute to " profits or gains arising or accruing " (sch. D., para. 1 (A)) in the year of account in which the transaction takes place, unless the consideration received by the vendor takes the form of money or an asset or assets readily convertible into money in that year. If it is not so convertible it cannot be represented by a figure of cash in that year and accordingly an asset in kind, such as a block of shares fully paid up, cannot be valued for the purpose of computing profits and gains unless it is immediately realizable. During the material years the vendor shares in question were not readily convertible into money. There is

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authority for the appellants' proposition in *Californian Copper Syndicate, Ld.* v. *Harris* (1); *Scottish and Canadian Gold Investment Co., Ld.* v. *Easson* (2); *Royal Insurance Co., Ld.* v. *Stephen* (3); *Westminster Bank, Ld.* v. *Osler* (4); *Raja Raghunandan Prasad Singh* v. *Bihar and Orissa Income Tax Commissioner* (5); *Bihar and Orissa Income Tax Commissioner* v. *Maharajadhiraja of Darbhanga* (6) and *John Emery & Sons* v. *Inland Revenue Commissioners* (7). There is nothing contrary to this principle expressed in *Harrison* v. *John Cronk & Sons, Ld.* (8) or *Hughes* v. *B. G. Letting & Co., Ld.* (9). *Absalom* v. *Talbot* (10) and *Craddock* v. *Zero Finance Co., Ld.* (11) afford no guidance here. The transaction in each case was essentially one under which the appellants could receive shares and nothing else. Although the shares were quantified in terms of money it is unreal to regard the appellants' right as one to 800,000*l.* (taking the case of Marlu) which they converted into a right to take the shares. The real price was the shares and not the value put on them. Essentially this was an arrangement under which the appellants parted with their interest in the concession in exchange for fully paid shares. They should be treated as traders parting with an asset (i.e., the concession). In determining whether a receipt is obviously the equivalent of cash (i.e., ready money) the normal test is whether there is a market for it. But the volume of the shares in this case could not be turned into the market without breaking the price, so that the cash equivalent for them could not be obtained. No one has been shown to be ready to give the ruling price (if any) to take over the appellants' position and they cannot put a sale price into their accounts unless there is a reasonable certainty that there is a purchaser. As it is, there is no present cash value. There is no general accounting or legal rule compelling them to enter on a valuation of these properties.

(1) (1904) 6 F. 894; 5 Tax Cas. 159.

(2) 1922 S. C. 242; 8 Tax Cas. 265.

(3) (1928) 44 T. L. R. 630; 14 Tax Cas. 22.

(4) [1933] A. C. 139; 17 Tax Cas. 381.

(5) (1933) L. R. 60 Ind. App. 133, 137.

(6) (1933) L. R. 60 Ind. App. 146, 160–2.

(7) [1937] A. C. 91; 20 Tax Cas. 213.

(8) [1937] A. C. 185; 20 Tax Cas. 612.

(9) [1940] A. C. 463; 23 Tax Cas. 174.

(10) [1944] A. C. 204; 26 Tax Cas. 166.

(11) (1946) 174 L. T. 385; 27 Tax Cas. 267.

A trader ought not to keep one set of accounts for the purposes of sch. D and another for his own purposes. The basis of the respondent's case is the suggestion that the appellants have obtained a trading profit greater than they have shown. In any event the conclusion of the commissioners as to the value of the Marlu shares was vitiated by the fact that they proceeded on the assumption that they must be valued at 800,000*l*. because they were allotted as the agreed method of satisfying a consideration of 800,000*l*.

F. Heyworth Talbot following. The cost to the appellants of the concessions sold to Marlu, viz. 107,875*l*. was entered in their books as the purchase price of the shares allotted under the sale agreement because the directors were not justified in concluding that they had made a profit and, accordingly, this figure was chosen, since any other would have shown either a profit or a loss. The question was not whether there had been a fair deal between the appellants and Marlu but what value was the auditor, as the company's watchdog, justified in putting on the shares. The purpose of the valuation, which must always be borne in mind, was to show whether there had been a profit or a loss or neither one nor the other, i.e., whether the directors of the appellant company had acquired an asset which would justify them in making a distribution to their shareholders. The proper road of approach in determining profits for income tax purposes is to take the account on sound commercial principles, although, once the account is taken, express statutory enactment may require them to be adjusted, sometimes up and sometimes down. It might be suggested that although there was no hope of realizing all the Marlu shares at reasonable prices within the particular accounting period, a part of them could have been so disposed of and could have been valued, but it cannot be accepted that any asset should be valued by relation to an imagined realization of part of it. If the shares are unrealized and unrealizable within the year there is no profit. The question is not whether a value can be put on the property but whether a profit has or has not been made within the year.

Sir Frank Soskice S.-G., J. H. Stamp and *Reginald Hills* for the respondent. The assessments in question have been rightly made under Case I of sch. D of the Income Tax Act, 1918. The appellants in each of the relevant years, made profits from the transactions of disposing of their mining rights in consideration of shares. They carried on the business of a finance company and dealers in stocks and shares and exploiters of and dealers in mining concessions and they carried out the transactions in the course of their trade. Two other authorities besides those already cited, are relevant: *Osborne* v. *Steel Barrel Co., Ld.* (1) and *Lace Proprietary Mines, Ld.* v. *Inland Revenue Commissioners* (2). In the case of Marlu there was a was a realization of the concession, i.e., as a result of a business or trading operation in the appellants' profit-making scheme, an asset was realized and a receipt made. The question is: What was the value of that receipt which resulted from a trading transaction? It should be valued as follows. Putting oneself at the moment of time when the receipt accrued, one should ask oneself: What value should at this moment be attributed to the receipt, on the assumption that it is disposed of in the manner appropriate for the disposal of such an asset? In the case of a large block of shares it may well be and probably is the case that the appropriate way of disposing of it is to dispose of the shares over a period of time extending beyond the year of receipt and the operation would probably be carried out through issuing houses. To dispose of any asset one must go through the right channels and if it can be converted into cash, then, though that may take time, it nevertheless has a value. It might be hard to dispose of twenty Rembrandts received in payment of a debt instead of cash but they have a value nevertheless. The fact that it may take a considerable time to dispose of an asset is a factor in determining its present value. There is nothing in business common sense or on the authorities requiring it to be said that such an asset cannot be valued on this basis unless it can be immediately disposed of. If a trader in a position to deal with assets of this type had acquired this block of shares he would regard himself as having acquired something of value, in the sense that he could get money for it, since it was convertible into money if he went the right way about it. For example, it could be disposed of to a company similar to the appellants, wishing to exploit it. If the shares have a value one must find out what it is and attribute it to them. The relevant questions are: Was there a completed trading operation? Did it produce a receipt? What was that receipt? What was its value? Admittedly if the commissioners had reached the figure they did on the assumption that the block of shares must of necessity be valued at the figure named as consideration, that would have been wrong. The agreement was not conclusive, though it might raise a presumption as to the amount of the correct value. The question of valuation was, however, one for the commissioners to determine so long as they did not proceed on an error of law. Here they reached the figure they did, not because the imagined that the agreement obliged them to do so but because, having considered all the circumstances, they concluded that it was the proper figure. [They also referred to the Income Tax Act, 1918, s. 133, sub-s. 1 (*a*).]

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(1) (1942) 24 Tax Cas. 293.

(2) 1938 S. A. L. R. (A. D.) 267.

J. H. Stamp following. This valuation was made in accordance with the revenue's contention (I) in the case stated that "it was a matter for the commissioners whether or not "they accepted the par value of the shares, this being the basis "agreed by the parties on which the concessions were sold." It was open to the commissioners to find that the value was the par value and accordingly this estimate made by the persons to whom the valuation was entrusted by the statute should stand.

Sir Cyril Radcliffe K.C. in reply. The first question in this case is: Is the right test in determining what figure to place against an asset which is a trading receipt, its ready money equivalent at the time of receipt, or is there some other general method of determining it called valuation which does not involve the consideration of this ready money equivalent? The first alternative is right and logical. The next question is: Did the commissioners intend to apply that principle? They certainly did not. The problem is what is to be put down in terms of money as the equivalent of the piece of property acquired and that is the present, the realizable or the market value. In the authorities these expressions mean the same thing: see *John Emery & Sons* v. *Inland Revenue Commissioners* (1) and *Hughes* v. *B. G. Utting & Co., Ld.* (2). The present value represents the same conception as what a purchaser would be willing to pay in ready money: see *Absalom* v. *Talbot* (3). The question, so far as the trading account is concerned is: What are you to account for in terms of money? In doing so one cannot put in something not capable of being turned into money: see *Inland Revenue Commissioners* v. *John Emery & Sons* (4) and *Scottish and*

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(1) [1937] A. C. 91, 94; 20 Tax Cas. 213, 226.

(2) [1940] A. C. 463, 475; 23 Tax Cas. 174, 196.

(3) [1944] A. C. 204, 212; 26 Tax Cas. 166, 189.

(4) 1935 S. C. 802, 809–11; 20 Tax Cas. 213, 223–5.

Canadian Gold Investment Co., Ld. v. *Easson* (1). Unless one can represent one's asset by a cash equivalent for which it is realizable at the time of receipt, one cannot bring any new figure into the account of one's trading for the year. This is a question of income tax, a claim by the Crown to be paid a sum on the basis that in the relevant years the appellants made a certain profit. If the asset were properly equated with a money value that would be justified but if, in assessing the value of the items alleged to represent the profit, there is attributed to them more than their ready money value, the taxpayer would not have the money to pay the tax. Here the directors of the company are implementing a long term policy and the investments are worth making although the shares have not a particular value now. The shares are valuable but not now capable of being given an exact monetary equivalent. The commissioners have not applied the test the law requires, the ready money test.

THE HOUSE took time for consideration.

July 14. VISCOUNT SIMON. My Lords, the main question involved is one of substantial importance and considerable difficulty. The commissioners found: "1. That when the "Marlu, Main Reef and Bremang shares were allotted to the "Trust there was a realization of the assets sold to those "companies. 2. That at the date of the allotment the value "of the shares received by the Trust was par, the price agreed "to be paid by the purchasing companies." The appellant company does not dispute the first finding. But it challenges the second which, in the case of the Marlu shares, has the result that the three million, two hundred thousand shares credited as fully paid-up which were received by the Trust as the consideration for parting with the relevant concession to Marlu must be valued for income tax purposes in the year 1934–5 at the figure of 800,000*l*. The appellants' argument comes to this, that no asset such as a block of shares fully paid-up can, for income tax purposes, be represented by a figure of cash in the year of account in which the transaction takes place, unless the asset is readily convertible into money in that year. If it was not, no money value could be attributed to it, because realization was not presently possible. The appellants further contended that upon examining the material set out in the case stated, the commissioners' conclusion as to value was vitiated

(1) 1922 S. C. 242, 246; 8 Tax Cas. 265, 271.

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since they had proceeded on the assumption that the block of shares must valued at 800,000*l.* because they were allotted as the agreed method of satisfying a consideration of 800,000*l.* The respondent concedes that if the commissioners had arrived at their figure on the view that the block of shares must necessarily be valued at the figure named, this was an error, and that the fact that the contract stipulated for an allotment of fully paid shares to an amount which at par was equivalent to the money figure might raise a presumption that this was the correct value, but was not conclusive. If, for example, at the time of the purchase of the concession the shares of the company stood at a high premium, an allotment of 5*s.* shares as fully paid as the method of discharging the consideration might confer on the company an asset worth more than the par equivalent of the shares. Equally, if contemporary dealings indicated a fall, the money value of the new asset might be less than par. But the respondent argues that it is all a question of valuation, which is a matter for the commissioners to determine, provided they do not proceed on a wrong view of the law, and that the commissioners in this case arrived at the figure, not because they were bound to do so, in view of the terms of the agreement, but because, after having considered all the circumstances in the case, they reached the conclusion that this was the right figure. We are left, therefore, with two issues, and I must express my opinion on both. One is what is the proper way of treating an asset not immediately realizable. The other is whether the commissioners have proceeded on the correct principle.

It seems to me that it is not correct to say that an asset, such as this block of shares, cannot be valued in money for income tax purposes in the year of its receipt because it cannot, in a commercial sense, be immediately realized. That is no reason for saying that it is incapable of being valued, though, if its realization cannot take place promptly, that may be a reason why the money figure set against it at the earlier date should be reduced in order to allow for an appropriate interval. Supposing, for example, the contract conferring the asset on the taxpayer included a stipulation that the asset should not be realized by the transferee for five years, and that if an attempt was made to realize it before that time, the property in it should revert to the transferor. This might seriously reduce the value of the asset when received, but it is no reason for saying that when received it must be regarded as having no

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value at all. The commissioners, as it seems to me, in fixing what money equivalent should be taken as representing the asset, must fix an appropriate money value as at the end of the period to which the appellants' accounts are made up by taking all the circumstances into consideration. It is a relevant circumstance that 800,000*l*. was the figure fixed upon as the appropriate consideration to be satisfied by fully paid shares. But it is also a relevant consideration that the asset could not be realized at once.

I adopt the conclusion expressed in Somervell L.J.'s judgment where he said (1): "When there has been, as is now admitted "here, a realization of a trading asset and the receipt of another "asset, and when that latter asset is marketable in its nature, "and not some merely personal advantage which by its nature "cannot be turned into money, the profits and gains must be "arrived at for the year in which the transaction took place "by putting a fair value on the asset received. The fact that "it could not, as we will assume here, owing to its size, be "disposed of in the market in that year, does not mean that no "profit or gain for income tax purposes has been made out of "the transaction." Cohen L.J., who delivered a separate judgment, reached the same conclusion, saying (2), with reference to the case of *John Cronk & Sons, Ld.* v. *Harrison* (3): "That case is, I think, clear authority for the view that, if an "asset is capable of valuation, it should be valued and brought "into the account, even though that value may not be presently "realizable in the accounting year. . . . . It is admitted that "the profit and loss account must include assets which have to "be valued, and I can see no reason why, if valuation is "possible, an artificial value, whether high or low, should be "placed on an asset merely because that value cannot be wholly "realized in the accounting year. The fact that it cannot be "realized in the accounting year is no doubt an element which "the commissioners should take into account in estimating the "value, but it is not a reason for attributing to the asset a value "far below that which other facts, e.g., the terms of the sales "agreement, the market quotation and the prices at which "the appellant company itself acquired shares in the market, "and its own statements to its shareholders about their value,

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(1) [1946] 2 All E. R. 742, 747; 25 A. T. C. 363, 372.

(2) [1946] 2 All E. R. 742, 479; 25 A. T. C. 368, 374.

(3) [1937] A. C. 185; 20 Tax Cas. 612.

"show that the asset should rightly bear." By "artificial "value" in this passage the Lord Justice meant the figure of 107,875*l.* which was the amount the Trust had spent in acquiring the site and proving the concession before they could ascertain that it was auriferous.

Counsel for the appellants called the attention of the House to a number of reported cases in which the valuing of an asset was simplified because the asset was readily realizable, but this circumstance, though dwelt upon when deciding that the unrealized asset must none the less be given a money value, is nowhere declared to be the ground of the decision. Thus, in *Californian Copper Syndicate, Ld.* v. *Harris* (1), where the syndicate was engaged in acquiring and reselling mining property, and it was held that the difference between the purchase price of such property and the value of the shares for which the property was exchanged, is a profit assessable to income tax, Lord Trayner dealt with the contention that there was no realized profit, since the shares had not been sold. He said (2): "A profit is realized when the seller gets the price "he has bargained for. No doubt here the price took the form "of fully paid shares in another company, but, if there can be "no realized profit except when that is paid in cash, the "shares were realizable and could have been turned into cash, "if the appellants had been pleased to do so." I read this last sentence as rejecting the syndicate's contention that it could not be liable because the shares had not been realized; it should not be understood to mean that the crucial test is prompt realizability. In *Scottish and Canadian General Investment Co., Ld.* v. *Easson* (3), Lord President Clyde upheld the conclusion of the commissioners that the profits of the company in the year in which it had received certain debentures should be assessed at a sum equal to 75 per cent. of the face value of those debentures, as representing their actual value. The Lord President said: "The question is just one of ascer- "taining the profits and gains of the company, and if, instead "of receiving cash, the company get a saleable security, that "saleable security is just part and parcel of the company's "profits and gains." The Lord President pointed out that the debentures themselves were saleable and had a value on the market, but he nowhere suggests that the true test is whether they could be sold immediately. Neither in *Royal Insurance Co., Ld.* v. *Stephen* (1), nor in *Westminster Bank, Ld.* v. *Osler* (2), do I find the proposition laid down which is essential to the appellants' main argument, that an asset in kind cannot be valued for the purpose of entering into the computation of profits and gains unless it is immediately realizable. In *John Emery & Sons* v. *Inland Revenue Commissioners* (3), where a firm of builders erected dwelling houses and thereafter sold them for a cash payment, subject to the ground annuals which they had created and retained in their possession, it was held in the Court of Session, and the decision was approved in the House of Lords, that the realizable value of the ground annuals should be accounted for in ascertaining the firm's trading profits. The judgments point out that ground annuals could be readily realized, but the test of immediate realizability is nowhere declared to be the essential point of the case. There is indeed authority to the contrary effect contained in, or at any rate implied by, the decisions of this House in *Harrison* v. *John Cronk & Sons, Ld.* (4) (above referred to) and in *Absalom* v. *Talbot* (5).

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(1) (1904) 6 F. 894; 5 Tax Cas. 159.

(2) (1904) 6 F. 894, 899; 5 Tax Cas. 159, 167.

(3) 1922 S. C. 242, 246; 8 Tax Cas. 265, 272.

In my view, the principle to be applied is the following. In cases such as this, when a trader in the course of his trade receives a new and valuable asset, not being money, as the result of sale or exchange, that asset, for the purpose of computing the annual profits or gains arising or accruing to him from his trade, should be valued as at the end of the accounting period in which it was received, even though it is neither realized nor realizable till later. The fact that it cannot be realized at once may reduce its present value, but that is no reason for treating it, for the purposes of income tax, as though it had no value until it could be realized. If the asset takes the form of fully paid shares, the valuation will take into account not only the terms of the agreement but a number of other factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, and so forth. There may also be an element of value in the fact that the holding of the shares gives control of the company. If the asset is difficult to value but is none the less of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible. It is for the commissioners to express in the money value attributed by them to the asset their estimate, and this is a conclusion of fact to be drawn from the evidence before them.

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(1) (1928) 44 T. L. R. 630; 14 Tax. Cas. 22.

(2) [1933] A. C. 139.

(3) [1937] A. C. 91; 20 Tax Cas. 213.

(4) [1937] A. C. 185; 20 Tax Cas. 512.

(5) [1944] A. C. 204; 26 Tax Cas. 166.

I, therefore, reject the main contention of the appellants and agree with the Court of Appeal. This would lead to a dismissal of the first appeal without further inquiry were it not that I entertain considerable doubt whether the commissioners' second finding is not, as its language might imply, a conclusion reached on the view that the shares must be valued at par because the price agreed to be paid for the concession was a sum of 800,000*l.* to be satisfied by an allotment and issue to the appellants of shares which at par would be equivalent to that amount. One of the contentions of the inland revenue set out in the case is that numbered (F): "That the price of the "concessions as agreed between the parties was the par value "of the shares," and if the commissioners arrived at the figure of 800,000*l.* on the view put forward in (F) that this must be the one and only proper figure of valuation, they were mistaken. The best course seems to be to refer the case back to the commissioners and request them to fix a proper figure of valuation in the light of the material before them as set out in the case and of any facts disclosed by further evidence before them. It may be that they will still arrive at the same figure, but if so this will be because the relevant factors, such as I have indicated above, lead them to this conclusion of fact. But the correct conclusion is not a figure inevitably forced upon the commissioners by the terms of the agreement taken alone, but is a question of fact to be answered after taking into account the relevant surrounding circumstances at the time of the transaction. This view of the matter also determines the question of the second appeal.

I, therefore, move that the appeals be allowed but only to the extent that the matter be referred back to the commissioners to reconsider and fix the proper figure in the light of these directions. There will be no costs awarded in respect of the appeals to this House. The late Lord Thankerton, who took part in the hearing of these appeals, expressed to me, before his death, his agreement with this conclusion.

LORD UTHWATT. My Lords, I have had the advantage of reading in print and considering the opinion which has just been delivered by the noble and learned Lord on the woolsack. I find myself in complete agreement with his conclusions and with his reasoning, and I am content to express my adherence to his opinion. My Lords, my noble and learned friend, LORD DU PARCQ, who is unable to be present here, desires me to say that he also agrees with the opinion which has just been expressed by the noble and learned Lord on the woolsack.

LORD OAKSEY. My Lords, in my opinion the appeal should be allowed and the case remitted to the commissioners on the ground that they appear to have thought that they were bound as matter of law to assume that the shares in question were worth their par value.

It remains to consider what is the true test for the commissioners' decision. It has been argued on behalf of the Crown that the fact, if it be the fact, that all the shares retained by the appellants could not be sold in the years in question is irrelevant, and that the commissioners may put a valuation upon the shares regardless of whether they could be realized at that value in the years of computation. In my opinion this argument is unsound. In the first place it is, I think, important to consider what is meant by an income tax on annual profits and gains. In my view it is a tax in money on profits in money which arise to the taxpayer in the year of computation. Income must not be confused with the source of the income. A taxpayer's obligation cannot be satisfied except by money: he has no option to offer other forms of property. The reason why he is not permitted to contend that he has made no profit in a transaction if he has made a profit but taken it not in money but in other forms of property, is that the property is the equivalent of money because it can be sold for money in the year. The word annual must at least connote "in the year" if it is to have any meaning at all, and that it has this meaning was laid down in *Ryall* v. *Hoare* (1) and approved in *Martin* v. *Lowry* (2). It follows, in my opinion, that what the commissioners had to decide in the present case, is what profit in money, if any, was or could be derived by the appellant company in the years in question, from the transaction by which they transferred the concessions to the Marlu, Gold Coast

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(1) [1923] 2 K. B. 447; 8 Tax Cas. 521.

(2) [1927] A. C. 312; 11 Tax Cas. 297.

Main Reef and Bremang companies for shares in the companies.

It is, of course, true that the concessions had an actual or intrinsic value at the time of the transactions, but that value lay in the future and was unknown ; it is also true that the appellant company was prepared to part with the concessions on the terms of the prospectuses, that is to say, in the hope of getting capital from the public sufficient to develop the concessions, whilst retaining the shares in question, but the par value of the shares retained was not an estimate of the actual value of the concessions either at that time or in the future, for both the appellant company and the public who subscribed for shares must have estimated the value of their shares both at the time and in the future at a higher figure. But the fact that the appellant company parted with the concessions does not mean that they realized or could realize at the time the money value of the concessions, for they did not receive cash but still retained in the shares their interest in the concessions. The appellant company will, of course, ultimately realize the value of the concessions to the company by selling their shares or holding them and receiving dividends on them. But all that the commissioners have to do in this case is to assess the profit on the transactions in the years in question and for that purpose, to bring into the appellant company's accounts the money value of the shares in the years of computation. The only true test of the money value of an article at a certain time is what can be got for it in money at that time : if it cannot be sold at that time or exchanged for something which can be sold at that time, no one can make a profit out of it which can be stated in terms of money at that time. If a picture dealer exchanges a picture for another picture and it is proved that the picture taken in exchange cannot be sold in the year, not for want of time, but because having been put up at auction there is no bid, can the revenue claim that a profit has been made on that transaction ? I am assuming, of course, in this illustration that it is proved that the picture cannot be sold in the year. In the present case there was evidence that some of the shares could have been sold, and the figure which they might have realized should, of course, be brought into the appellant company's accounts. Moreover it is not a question whether they could be sold in any particular market such as the London Stock Exchange. But if the commissioners are satisfied that the shares could not have been sold for money in Paris, New York or London or anywhere in the world in the years in

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question, then to bring in a cash figure for those shares, is, in my opinion, attributing to the years in question profits which might or might not be realized in future years. It is, in my opinion, unsound accounting and unsound law to lay down that the commissioners should value the shares by estimating what they may bring in by way of dividends and sales in future years, and then discounting that figure so as to arrive at their present value. There are no facts upon which the commissioners can base such an estimate : it is simple guesswork and, as a matter of fact, has probably been entirely falsified by the course of events which has included the recent war. If one assumes that the commissioners are satisfied as a matter of fact that the shares could not have been sold in the years in question, such a valuation must either be a contradiction of the fact or an estimate of future value. The commissioners should, in my opinion, come to a conclusion on the evidence how many of the shares in question could have been sold in the years of computation, and at what price, and should bring into the appellant company's account that figure as against the cost of the concessions to the appellant company. To adopt this principle appears to me to be in accord with every case which has been cited to your Lordships' House on this appeal and with the fundamental principles of the Income Tax Acts.

Appeals allowed on the terms stated in Viscount Simon's opinion.

Solicitors for appellants : *Birkbeck, Julius, Edwards & Coburn.*

Solicitor for respondent : *Solicitor of Inland Revenue.*

[HOUSE OF LORDS]

CARROLL . . . . APPELLANT ; H. L. (Sc.).

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ANDREW BARCLAY & SONS, LD. . RESPONDENTS. May 26, 27. July 14.

Factory — Fencing — Transmission machinery — Breakage — Injury to workman—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 13, *sub-s.* 1.

The requirement of s. 13, sub-s. 1, of the Factories Act, 1937, that " every part of the transmission machinery shall be securely " fenced " imposes on occupiers of factories a duty to erect a barricade to prevent any employee from making contact with the machinery, and does not in ordinary cases oblige them to erect an enclosure to prevent broken machinery from flying out and injuring him.

Quaere whether, in the case of a machine which in working might be expected to throw off loose or broken parts, there might be an obligation to fence it for the purpose of protecting the workman against that danger.

Decision of the Second Division of the Court of Session (1947 S. C. 411) affirmed.

APPEAL from the Second Division of the Court of Session.

The facts, stated by LORD PORTER, were as follows: The respondents carried on business as engineers at the Caledonia Works in Langland Street, Kilmarnock, and were occupiers of those works within the meaning of the Factories Act, 1937. The appellant was a machinist and in the course of his duties operated a lathe in the respondents' boiler shop. Immediately in front of the lathe at which the appellant was standing, and about 6½ feet away, the motor for driving the main shaft of the shop was placed, and over this motor at a height of about 25 feet the main driving shaft was situated. This shaft was operated from the motor by means of a balata belt about 9 inches wide and ¼ of an inch thick which ascended on the side remote from the position in which the appellant was working, passed over a pulley attached to the driving shaft, and was pulled down on the side nearest to him—the tension side—by the motor. The belt did not ascend vertically but sloped away at an angle from the spot in which the lathe

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* *Present:* VISCOUNT JOWITT L.C., LORD PORTER, LORD DU PARCQ, LORD NORMAND and LORD MORTON OF HENRYTON.

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was fixed. The motor, belt, shaft and pulley formed part of the transmission machinery of the works within the meaning of the Factories Act, 1937. The appellant was protected from the motor by a fence some 5 feet high but over the 20 feet between that fence and the overhead driving shaft the belt was unprotected and his position at the lathe placed him in a direct line with the revolving belt. On March 16, 1945, while the appellant was working at his lathe the belt broke, lashed out over the fence and struck him, causing him serious injury.

The appellant sued the respondents for damages in the Sheriff Court at Kilmarnock, averring that the accident was caused by a failure to fence the belt adequately and securely in breach of the common law duty of reasonable care and of s. 13 of the Factories Act, 1937. The Sheriff Substitute found for the appellant on both grounds and awarded the sum of 500*l*. damages. An appeal was taken to the Court of Session and the Second Division of the Court recalled the interlocutor of the Sheriff Substitute, substantially altered his findings of fact and assoilzied the respondents.

The findings of the Second Division of the Court of Session as to the circumstances of the accident were set out in their interlocutor as follows : " (11.) The breaking of a balata belt is " a very infrequent occurrence, and such an occurrence as " a belt coming out from its guard and causing injury to " a person working or standing outside the guard enclosing " the motor and belt has never been known to have happened " within the experience of the witnesses examined on both " sides ; (12.) It was proved that for nearly forty years past, " and now, the practice of all comparable factories was and is " the same. It is not the practice in comparable factories to " fence a motor and vertical belt above a distance of approxi- " mately 5 or 6 feet, with a maximum of 8 feet. The practice " is to fence to such a height as aforesaid, and that is found " sufficient to prevent any operator or other person legitimately " on the premises coming into contact with any part of the " belt ; (13.) The solitary example afforded in the whole proof " of fencing the upper portion of such vertical belting was " the single case of a precaution taken after the accident by " the present defenders. The defenders some time after the " accident moved the motor itself to a different position in " the boiler shop, and, by way of rendering recurrences of " such accident less likely they erected a fence on the tension

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"side of the belt to a height of some 15 feet above the floor; "(14.) In the case of a firm which had a large number of belts "operating of the same kind as the belt in this case it might "be impracticable both from the constructional and commercial "points of view to have them guarded from floor to roof "and on all sides, both on account of the high cost and of the "difficulty of changing and repairing belts, but to fence the "tension side of the main driving belts only might be commercially possible, but, with the single exception above "referred to, this has not been known anywhere to be done."

The appellant appealed to the House of Lords.

Paull K.C. and *R. M. Everett* for the appellant. The appellant has been injured through the fault of the respondents who failed in their duty at common law to take reasonable precautions against a danger which, as reasonable men, they should have anticipated. They were also in breach of their statutory duty under s. 13, sub-s. 1 of the Factories Act, 1937. In that sub-section "securely fenced" means fenced so as to be secure against all dangers, including the breaking of such a belt as this, which, though infrequent, was not unknown. A monkey would not be "securely fenced" if he could get out nor would a mule if he could kick someone outside his enclosure. The case would be different if the monkey threw a stone out and in the case of a machine it is not necessary to fence it so that no materials can be thrown out. Here, however, the belt which broke was part of the transmission machinery and it was the respondents' duty to have it securely fenced. The language of s. 13, sub-s. 1, is in contrast with that of s. 14, sub-s. 1, which makes a similar provision as to dangerous parts of any machinery. Whereas, before the duty imposed by s. 14 becomes operative, the machinery must be proved dangerous, s. 13 imposes an absolute obligation to fence the transmission machinery, not only against risks resulting from its working but against all dangers foreseeable or unforeseeable, whether in the course of working or in accidental breaking. It is designed to protect workmen not only from approaching transmission machinery in action and being injured thereby but also against the breaking of any part of the machinery and its flying out, so as to injure those employed on the premises. The sub-section does not distinguish between a man coming into contact with the machine and the machine coming into contact with the man, and this

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contact the respondents failed to prevent. There is nothing to limit the protection the sub-section affords and the decision appealed against involves reading into it a proviso which is not in the Act. The words "securely fenced" are unqualified and unrelated to any reasonable apprehension of danger. This is in accordance with the clear intention in s. 12, sub-s. 3, s. 13, sub-s. 1, and s. 14, sub-s. 1, that every person working on the premises should be protected. From the absolute duty imposed by s. 13, sub-s. 1, an escape is provided in suitable cases by sub-s. 5. *Hindle* v. *Birtwistle* (1) is in the appellant's favour and the respondents cannot succeed unless it was wrongly decided. In *Nicholls* v. *F. Austin (Leyton), Ld.* (2) the House of Lords were dealing with a question which does not arise in the present case, because the words of ss. 13 and 14, defining the parts to be fenced, are different. The word "dangerous" is not in s. 13, so the question is not the extent of the application of the words "dangerous part." but whether the obligation to fence is imposed only in respect of transmission machinery in position and operating normally or also to guard against a part of it leaving its usual course and thereby causing injury to a workman. [They also referred to *Sowter* v. *Steel Barrel Co., Ld.* (3); *Atkinson* v. *L. & N. E. Ry. Co.* (4); *Kinder* v. *Camberwell Corporation* (5); *Harrison* v. *Metropolitan Plywood Co.* (6) and *Chalmers* v. *Speedwell Wire Co., Ld.* (7).]

Walker K.C. and *Sloan* (both of the Scottish Bar) for the respondents. The accident was not caused through the respondents' negligence or through a breach of statutory duty on their part. As to the alleged statutory duty, the obligation to "fence securely" does not extend to preventing the machinery from flying out. Keeping the workman out and keeping the machine in (i.e., guarding against the risk of its breaking) are two essentially different things. The risks involved are totally different. In the Act the legislature had not in mind the idea of keeping the machine in. For example, in the case of an electric generator, one could not fence it in, except in the sense of keeping the workmen out. There is no obligation to fence against parts of a machine which may break and fly off. The whole purpose of s. 13, sub-s. 1, is that the fencing should prevent persons being injured by coming into contact with the machinery in motion. It does not deal with its escape from its position and its impact on the workman consequent on that escape. It occurs in a group of sections (ss. 12 to 16) dealing with fencing of machinery and these sections, read together, show that this is the purpose of the fencing. The requirements of s. 12, sub-s. 3, s. 13, sub-s. 1, and s. 14, sub-s. 1, are identical. The reference in those sub-sections to the position of the machine means its position unbroken. The proviso to s. 14, sub-s. 1, indicates that the object in view is to keep the workman from coming into contact with the machine : see also s. 15 (*b*). The requirement in s. 16 that the fencing shall be of "substantial "construction" seems to provide for one standard only, and there is no clear standard of the strength of a fence required to contain the flying parts of broken machinery. In these sections the danger of machinery breaking is not considered and ss. 22 to 26 have no bearing on the provision of sound machinery. The common law obligation to use due care is the only sanction against ill-constructed machinery, save where regulations have been made under s. 60 : see for example the Shipbuilding Regulations, 1931, where reg. 11 (*b*) amounts almost to a guarantee. The Act nowhere aims at the danger of broken machinery ; it provides for danger in working. There is no breach of statutory obligation here, and on the common law point the respondents cannot, in view of the findings of fact of the Second Division, be held guilty of negligence.

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(1) [1897] 1 Q. B. 192.

(2) [1946] A. C. 493.

(3) (1936) 154 L. T. 85; 33 L. G. R. 376.

(4) [1926] 1 K. B. 313.

(5) [1944] 2 All E. R. 315; 42 L. G. R. 317.

(6) [1946] K. B. 255.

(7) 1942 S. C. (J.) 42.

Paull K.C. in reply. If the respondents were right there would have been a different decision in *Hindle* v. *Birtwistle* (1), and the legislature, if such had been their meaning, could easily have expressed it by prescribing fencing to prevent the workman touching the transmission machinery but, under the words used, it must be fenced against all eventualities. It is essential that s. 13, sub-s. 1, should bear this meaning, because it is well known that belts such as this do break and transmission machinery includes parts which by their nature may break. Accordingly the obligation to fence is absolute. Under s. 12, sub-s. 1, a flywheel must be fenced, as a protection against its bursting, even though no one can come near it. Under s. 60 the power to make regulations is limited to cases where any plant is of such a nature as to cause risk of bodily injury.

(1) [1897] 1 Q. B. 192.

THE HOUSE took time for consideration.

July 14. VISCOUNT JOWITT L.C. My Lords, I have had the advantage of reading the opinions which my noble friends are about to deliver. They all agree in the result that the appeal must be dismissed. I confess that I have found this a difficult case, but I am not prepared to dissent from their conclusions. At the same time I should desire to leave open for further consideration the question which Lord du Parcq raises in his opinion.

LORD PORTER. My Lords, the appellant claimed damages for his injuries upon two grounds, firstly, for negligence at common law and, secondly, for breach of the statutory requirement contained in s. 13 of the Factories Act, 1937. Having regard to the findings of the Court of Session, it would be difficult, if not impossible, for the appellant to maintain that the respondents were guilty of negligence at common law and before your Lordships' House that claim was, as I think, properly and necessarily abandoned. But, even though they were doomed to failure at common law, the appellant's representatives maintained that he was entitled to recover, owing to the breach by the respondents of the obligations imposed by s. 13, sub-s. 1, of the Factories Act, 1937. That sub-section runs as follows: " Every part of the transmission machinery " shall be securely fenced unless it is in such a position or " of such construction as to be as safe to every person " employed or working on the premises as it would be if " securely fenced." With this language is contrasted that of s. 14, sub-s. 1, which makes a similar provision as to dangerous parts of any machinery, and it is contended that, whereas machinery has to be proved dangerous before the duty imposed by s. 14 becomes operative, s. 13 imposes an absolute obligation upon the occupier of the premises securely to fence transmission machinery not only against any risk resulting from its working but against any dangers, foreseen or unforeseen, foreseeable or unforeseeable, and whether in the course of working or in the accidental breaking of the machinery involved. It is to protect the workmen, it is maintained, not only from approaching and being injured by the transmission machinery in action but also against the breaking of any part of that machinery and its flying out and injuring those who are employed in the works: the duty is not confined to shutting off the employee from danger but includes shutting in the transmission so that it cannot fly out and strike the workman if it breaks. My Lords, so to construe the section is to impose a heavy obligation on the employer, but if the section so enacts, its terms must be followed. The respondents, on the other hand, maintain that the sub-section aims at and in words provides only for the protection of the workman against coming into contact with the transmission machinery, not against its escape from the position in which it is placed and its impact upon him. Nowhere, it is said, is there any indication that the Act aims at the dangers threatened from broken machinery, it is danger in working which has to be avoided: moving machinery transmitting power is always dangerous unless the operators are shut off from approaching its working parts, but there is nothing in the Act to show that the occupier is an insurer of the sound construction of the working parts of his machines: at common law, no doubt, he is liable for any negligence in the provision of sound machinery and must give adequate supervision to its upkeep, but no such duty is laid upon him by the Factories Act: that Act is enacted to ensure the workman against the dangers resulting from its working and from nothing else.

My Lords, the correct solution of this problem must depend on the true construction of the terms of the Act. The provisions which deal with fencing are to be found in ss. 12 to 16 inclusive and it is, I think, noteworthy that in the case of the first of these sections which is concerned with prime movers there is an absolute obligation to fence, without any qualification whatever except for electric generators and so forth which by sub-s. 3 are subject to a less stringent rule. Apart from such generators, prime movers, which are defined in s. 52 and do not include the belt in question, must be securely fenced whether they are safe or not and whatever their position or construction. If they are unfenced the occupiers of the factory are guilty of an offence. In the case of electric generators, however, and also in the case of transmission machinery (s. 13) and dangerous machinery (s. 14) fencing is not required if the position or construction of the machinery renders it as safe to everyone employed or working on the premises as it would be if securely fenced. The only difference between transmission and dangerous machinery is that, subject to the qualification mentioned above, the former must be fenced whether it is dangerous or not, whereas the latter must be proved to be dangerous before the duty to fence comes into existence. In either case, fencing is obligatory unless the exceptions apply. But it still remains to be determined against what dangers the fencing is to be a safeguard and what circumstances the exceptions embrace. For my own part, I find it difficult to envisage any set of circumstances in which unfenced machinery would be safe, owing to its position or indeed construction if the risk of breakage is to be taken into consideration. In such a case no position, at any rate, could warrant that employees might not be injured or that the machinery would be as safe as if it was securely fenced. And equally if breakage is to be guarded against, the distinction between machinery which is dangerous and that which is not seems to disappear. All machinery is potentially dangerous because it may break, but the Act is not concerned with danger in that sense, it is danger in working against which it is framed to give security. Throughout the relevant sections I can find no hint that the danger of machinery breaking has been taken into account. The words " of such " construction " in s. 12, sub-s. 3, s. 13, sub-s. 1, and s. 14, sub-s. 1, deal with types of construction, not with the strength of the machine; ss. 22 to 26 provide for lifts, floors and methods of ingress and egress and have no bearing on the provision of sound machinery. Unless the matter be dealt with by regulations made under s. 60, the common law obligation to use due care seems alone to be the sanction against weak or ill-constructed machinery. So far indeed from suggesting that the breakage of machinery is under consideration in ss. 12 to 16, indications to the contrary are, I think, to be found. Certainly the provisions of s. 13, sub-ss. 3 and 4, show no tendency to keep in mind the breaking of driving belts and s. 14 not only speaks of a device " which automatically " prevents the operator from coming into contact with that " part " (i.e., a dangerous part) in the proviso to sub-s. 1, but in sub-s. 2 (*a*) refers to preventing " the exposure of a dangerous " part of machinery whilst in motion," and I cannot read those phrases as intending anything more than a device to keep the workman from the dangerous part of the machine. Finally sub-s. 3 talks of " articles which are dangerous while in motion " in the machine." From all these expressions I conclude that it is risk arising from the motion of the machine which is being guarded against, whether the part concerned is the transmission or dangerous in working. Even s. 15 (*b*) contains the same suggestion when it permits certain work to be done whilst the machine is in motion if to stop it would seriously interfere with the carrying on of the process.

None of the cases which deal with the matter or were quoted to us seem to me to controvert this view. The latest in your Lordships' House, *Nicholls* v. *F. Austin* (*Leyton*), *Ld.* (1), was concerned with injury caused by a piece of wood flying out from a circular saw which was said to be dangerous because of its tendency to throw out such pieces. I can imagine it being said that a circular saw is dangerous because of this tendency and that the obligation to fence dangerous machinery is to obviate its dangers, yet your Lordships held that the workman could not recover and Lord Thankerton said (2) that the obligation to fence under s. 14, sub-s. 1, was to guard against contact with any dangerous part of a machine and not to guard against dangerous materials ejected from it. On the other hand, where there was danger, which should have been anticipated, that part of the machine (e.g., a spindle) would fly out, as in *Hindle* v. *Birtwistle* (3), it was held that the machine itself was dangerous in that respect and should have been fenced. So too where a driving shaft was situated 13 feet up, but it could not be assumed that the shaft would never be approached by any person employed in the factory, as in *Atkinson* v. *L. & N. E. Ry. Co.* (4), and in a case where the handle of a machine flew up and in the ordinary course of affairs danger might be contemplated from the use of the machine without protection, as in *Kinder* v. *Camberwell Corporation* (5), the employers have been held under a duty to fence. In each case, however, it was injury, caused by the working of the machine and the danger which might reasonably be contemplated from its working. Even in the case of the flying spindle, it was not a breaking of a part of the machine, but an accident which might have been expected from its ordinary working which had to be guarded against. The machine was found to be a dangerous one because of the liability of spindles to fly out and it was that danger which was liable to occur in the course of its ordinary working, not its abnormal action in breaking, for which a fence had to be provided. *Harrison* v. *Metropolitan Plywood Co.* (6) was a decision upon the construction and effect of the Woodworking Machinery Regulations, 1922, reg. 17, which Hilbery J., following a decision of the Court of Appeal in *Miller* v. *William Boothman & Sons, Ld.* (1), held to supersede s. 14 of the Factories Act, and not upon the wording of the Act itself, and therefore, whatever its effect, does not deal with the matter now in issue.

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(1) [1946] A. C. 493.
(2) Ibid. 499.
(3) [1897] 1 Q. B. 192.
(4) [1926] 1 K. B. 313.
(5) [1944] 2 All E. R. 315; 42 L. G. R. 317.
(6) [1944] K. B. 255.

In my opinion, it is not necessary for your Lordships to consider in respect of any of these cases how far the facts support the decision : the principle is plain. Any risk arising from the working of a dangerous machine must be guarded against under s. 14 and any danger emanating from the working of transmission machinery must likewise be guarded against under s. 13. The working of transmission machinery is deemed to be dangerous ; other machines need not be fenced unless they, or some part, are in fact dangerous. But in neither case does the Act aim at protection against breakage. In the present instance it was, no doubt, the duty of the respondents to fence the transmission machinery. That part, however, which a workman could enter upon was securely fenced and the belt was in such a position as to be as safe as it would be if securely fenced unless it broke. Had it been in such a position that the workman could come into contact with it, it would not have been so safe and in that case it would have been necessary to fence it. Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with the machine, not an enclosure to prevent broken machinery from flying out. I would dismiss the appeal.

LORD DU PARCQ (read by LORD NORMAND). My Lords, I have had the advantage of reading in advance the opinion which has been delivered by my noble and learned friend Lord Porter and that which my noble and learned friend Lord Normand is about to deliver, and am in general agreement with them.

I wish to add, however, that, while I agree with Lord Normand that the words " securely fenced " must be given the same meaning in each of the three sections (ss. 12, 13 and 14), I think that they may well mean " so fenced as to " give security from such dangers as may be reasonably " expected." If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend Lord Simonds in *Nicholls* v. *F. Austin* (*Leyton*), *Ld.* (1) is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion upon it.

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(1) [1944] K. B. 337.

Section 13 does not state expressly what is the nature of the danger which is contemplated, but, in the light of the findings of the Court of Session and of such knowledge of these matters as most adult persons may be supposed to possess (for I claim no special knowledge), I think that it would be wrong to hold that the legislature had in mind the remote possibility of the transmission gear breaking and so coming into contact with a workman's body. The construction for which the appellants contend would put a heavy burden on employers to little purpose. If Parliament intended to impose such a burden, it would, I think, have expressed its intention plainly.

I agree, therefore, that the appeal should be dismissed.

LORD NORMAND. My Lords, the appellant, if he did not abandon the case on common law negligence, at least maintained it with little confidence and it is unnecessary to say more than that the findings of fact are destructive of it.

Section 13, sub-s. 1, of the Factories Act, 1937, requires that: " Every part of the transmission machinery shall be " securely fenced unless it is in such a position or of such " construction as to be as safe to every person employed or " working on the premises as it would be if securely fenced." The sub-section imposes an absolute obligation in the sense that the obligation, whatever its meaning and effect, must be actually fulfilled and not merely that the occupier of the factory must do his best to fulfil it, and also in the sense that the obligation is not subject to any relaxation by the Secretary of State on the ground that it is unnecessary or impracticable: (see s. 13, sub-s. 5.) The appellant maintains that its content also is absolute and accordingly that the transmission machinery must be so " securely fenced " that all persons who are employed or working on the premises shall be protected not only from the danger of contact with the transmission machinery or any part of it while it is working in situ but also against all parts of it which may fly off if it breaks or comes to pieces. The respondents maintain that the obligation is merely to fence the transmission machinery in such a way as to prevent contact between it and persons employed or working on the premises, and that is the meaning put upon the section by the learned judges of the Court of Session.

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(1) [1946] A. C. 493, 505.

It is common ground that the crucial words are " securely " fenced " and that they must have the same meaning wherever they occur in the statute. Section 12, sub-s. 1, requires that every flywheel directly connected to any prime mover and every moving part of any prime mover except those mentioned in sub-s. 3, shall be securely fenced. Prime mover means (s. 152, sub-s. 1) " every engine, motor or other " appliance which provides mechanical energy derived from " steam, water, wind, electricity, the combustion of fuel or " other source." Section 12, sub-s. 3, requires that : " Every " part of electric generators, motors and rotary converters, and " every flywheel directly connected thereto, shall be securely " fenced unless it is in such a position or of such construction " as to be as safe to every person employed or working on the " premises as it would be if securely fenced." Section 14, sub-s. 1, requires that : " Every dangerous part of any " machinery, other than prime movers and transmission " machinery, shall be securely fenced unless it is in such " a position or of such construction as to be as safe to every " person employed or working on the premises as it would be " if securely fenced." But there is a proviso " that, in so far " as the safety of a dangerous part of any machinery cannot " by reason of the nature of the operation be secured by means " of a fixed guard, the requirements of this sub-section shall " be deemed to have been complied with if a device is provided " which automatically prevents the operator from coming into " contact with that part."

I do not find in these provisions or elsewhere in the Act any clear positive instruction that the fencing shall be so constructed as to contain the flying fragments of, for example, a broken flywheel or a broken driving shaft. If there were such an instruction it would be irrelevant to consider the difficulties of fulfilling it. The appellant's counsel, however, submitted that the construction for which he contended results from the intention apparent in s. 13, sub-s. 1, s. 12, sub-s. 3, and s. 14, sub-s. 1, that every person employed or working on the premises should be protected ; he also founded his argument on the words " securely fenced," which he treated as unqualified and unrelated to any reasonable apprehension or expectation of danger. But the intention that every person employed or working on the premises shall be protected does not show that danger from flying parts of a broken machine to persons at a distance from it is contemplated. All that it means is that anyone working in a factory who may be, or who may pass, near the machinery to be fenced, though his work is not particularly associated with it, shall enjoy the protection. The word " fence " does not suggest to my mind the massive kind of structure which might be necessary to contain the parts of a large flywheel breaking apart while rotating at high speed. The only express provision in the Act dealing with the kind of fencing required is that it shall be " of substantial construction " (see s. 16). But that is scarcely more than an injunction against flimsiness, and it is satisfied by the sort of fence that is sufficient to afford good protection to workmen against contact with the machinery when it is working in situ. Nor does the word " securely " appear to import absolute protection against all possible contingencies, rather than protection against the danger of contact.

In the absence, therefore, of any clear positive indication that the obligation to fence securely has the meaning attributed to it by the appellant, the implications of the material sections as a whole must be considered, and practicability becomes relevant to the construction of the obligation. The commercial practicability of the appellant's construction would vary according to the size and other characteristics of the machinery to be fenced. It is found as a fact that the fencing of the tension side of main driving belts might be commercially possible and I assume that a fence such as guarded the lower part of the driving belt in the present instance would contain most driving belts in common use if they were to break. But if the obligation is to apply to every flywheel and to every moving part of a steam-driven prime mover and to all driving shafts, much heavier and more solid containers would be necessary, and the cost in many factories would become prohibitive. An even more important consideration, especially in a penal statute, is the uncertainty which would result from this construction of " securely fenced," for no clear standard of the strength of fence required to contain the force of flying parts of broken machinery is, or could be, provided by the Act, and the problem whether the obligation was being fulfilled would in any particular case be incapable of rational solution. There are besides in the Act indications which seem to me to show that the purpose of the fencing is to provide against contact with the machinery which, rather than the breaking of machinery, is the characteristic danger to be apprehended by workmen in factories. The various kinds of machinery dealt with in s. 12, sub-s. 1, are treated as dangerous in themselves in all circumstances, but the machinery dealt with in s. 12, sub-s. 3, though also dealt with as dangerous in itself, is not regarded as dangerous in all circumstances, for the statute recognizes that it may be as safe as if securely fenced, either by reason of its position or by reason of its construction, and then fencing is not required. But on the hypothesis that breakage and flying pieces are among the dangers to be guarded against, position could scarcely confer the same safety as a secure container, and on the same hypothesis, the conception of safety by reason of the construction of the machinery becomes almost meaningless. Section 13, sub-s. 1, provides for fencing of the transmission machinery in terms identical with those of s. 12, sub-s. 3, and is subject to the same comments. Section 14, sub-s. 1, is concerned with dangerous parts of machinery not dealt with in the two preceding sections, and the obligation to fence is expressed once more in the same terms as s. 12, sub-s. 3, and s. 13, sub-s. 1. But there is a distinction that in s. 14 no assumption is made that the machinery is in itself dangerous, and the obligation does not apply except to parts of machinery which can be shown to be dangerous. It is possible, therefore, that if a machine may be expected to throw off detachable or broken parts in working, these parts may fall to be treated as dangerous and subject to the requirements of secure fencing. That is, however, a question on which I express no opinion. The proviso to s. 14, sub-s. 1, makes it clear that whereas the best form of fencing for dangerous parts of a machine is a fixed guard, yet the obligation to fence will in defined cases be deemed to be complied with if a device is provided which automatically prevents the operator from coming into contact with that part. The difference between the fence prescribed by the substantive part of the sub-section and the device is not that one is a fence and the other is not, but that the device is a fence which protects only the operator and not every person employed or working on the premises. It is, therefore, necessary to say that it shall be deemed to be compliance with the requirements of the sub-section. But the kind of protection which is given to the operator by the device is the same kind of protection as that given to every person employed or working on the premises by the prescribed fence or guard, and it is protection against contact. These indications that the danger in contemplation is the danger of contact between the workmen and the machinery working in situ are, I think, conclusive; but there are other indications also to which my noble and learned friend, Lord Porter, has directed attention. I agree with what my noble and learned friend said about them and I need say no more.

There is nothing in the cited authorities which runs counter to the conclusion to which I have been led by an examination of the relevant statutory provisions. No authority was cited in which the provisions of s. 13 were concerned. In *Harrison* v. *Metropolitan Plywood Co.* (1), the plaintiff, who was injured when a piece of the cutter of a spindle moulding machine broke away, flew out of its holder and struck him, was held entitled to recover damages because the defendants had been in breach of an obligation to fence under a regulation the wording of which is not identical with that of the Act. The point taken by the respondents in the present case that there is no obligation to fence against parts of a machine which break and fly off was not taken. It is not necessary to consider whether that case was rightly decided, and I have already reserved my opinion on the effect of s. 14 in relation to cases resembling it. In *Kinder* v. *Camberwell Corporation* (2), the handle of a compresser machine sprang up and injured the plaintiff, who successfully pleaded breach of the obligation to fence under s. 14. There the handle was never detached from the machine of which it was held to be a dangerous part. On the facts the decision may have been right or wrong, but it involves no principle or construction of the Act inconsistent with the respondents' contentions. *Nicholls* v. *F. Austin (Leyton), Ld.* (3), was also a case on s. 14. This House held that the obligation to fence a circular saw was satisfied if it was adequately fenced so as to protect workmen against contact with it, but not so as to protect workmen against particles of wood flying from it. Lord Simonds said in the course of his speech (1): "The fence is "intended to keep the worker out, not to keep the machine "or its product in." So far as the noble and learned Lord dealt with keeping in the machine as opposed to its product, his observation was unnecessary for the decision of the case. Nevertheless, it was a deliberate expression of opinion which I respectfully adopt, though it may still be necessary to reserve the case of a machine which in working may be expected to throw off loose or broken parts. For these reasons I would dismiss the appeal.

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(1) [1946] K. B. 255.

(2) [1944] 2 All E. R. 315; 42 L. G. R. 317.

(3) [1946] A. C. 493.

LORD MORTON OF HENRYTON. My Lords, the short but important question which arises in this case can be stated as follows—which of two alternative meanings should be given to the opening words of s. 13, sub-s. 1, of the Factories Act, 1937: "Every part of the transmission machinery shall be "securely fenced . . . ." Do these words mean that every part of the transmission machinery shall be so fenced as to prevent any person employed or working on the premises from moving into contact with it, or do they bear the wider meaning that every part of the transmission machinery shall be so fenced as to prevent contact occurring in any way between any part of the machinery and any person employed or working on the premises? Ultimately the answer to this question depends upon the meaning which should be attached to the word "securely."

No other question falls to be determined by your Lordships' House. Counsel for the appellant workman at first sought to argue that the respondent employers were guilty of negligence at common law, but when it was pointed out that the findings of fact of the Second Division of the Court of Session were binding on this House, he felt unable to pursue that line of argument.

If the wider meaning stated above is given to the word "securely," it is obvious that the appellant must succeed, since a part of the transmission machinery came violently into contact with him and injured him; if the narrower meaning is given to that word, it is equally obvious that the appeal must be dismissed, as it is not suggested that the five-foot fence round the transmission machinery was insufficient to prevent persons from moving into contact with that machinery.

(1) [1946] A. C. 493, 505.

In considering what meaning should be given to the word "securely" in s. 13, sub-s. 1 I start from this point, that in the ordinary course of events no part of the transmission machinery moves outwards from its normal position, while, on the other hand, there is always a grave risk that persons may move into contact with the machinery, and sustain injury, unless they are prevented from so doing by a fence. Prima facie, a fence to keep persons out would seem more appropriate than a fence to keep the machinery in. Next, it is to be observed that the sub-section contemplates that the transmission machinery may be "in such a position or of such "construction as to be as safe to every person employed or "working on the premises as it would be if securely fenced." Now if the purpose of the fencing is to keep persons from moving into contact with the machinery, this part of the sub-section gives rise to no difficulty. If, however, the fence is to be of such a kind as to prevent any part of the machinery from flying outwards and coming into contact with any person, it is difficult to imagine any position, and still more difficult to imagine any construction, which would render the machinery *as safe* to persons employed or working on the premises as it would be if surrounded by a fence of the kind just described.

If one turns to the other provisions of the Act, there are indications here and there that the narrower meaning should be given to the word "securely." These indications have been fully stated by others of your Lordships, and I shall not indulge in repetition. Finally, I think that the words "securely fenced" should be given the same meaning wherever they occur in the Act, and, as has been pointed out, if these words are given the wider meaning throughout, great, and perhaps insuperable, practical difficulties would face manufacturers all over the country. It does not seem likely that the legislature would intend the provisions of ss. 12 to 16 to have these results. If the words are capable of bearing only one meaning, they must be given that meaning; but if, as I think, they may fairly bear one of two meanings, it is right to have some regard to the practical results.

Taking all these matters into account, and bearing in mind that this is a penal statute, I have come to the conclusion that the narrower construction of the word "securely" is correct. It follows that no breach of s. 13, sub-s. 1, has been proved in this case, but the injured workman would, of course,

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have been entitled to succeed if he had established that the respondent company was guilty of negligence at common law.

I agree with the view just expressed by my noble and learned friend Lord Normand that there is nothing in the cited authorities which runs counter to this conclusion, and I prefer to express no opinion on the construction of s. 14, sub-s. 1, as the present appeal is concerned only with s. 13. At the moment, and without further argument and further consideration, I feel unable to express assent to the observations which have been made upon the former section and its predecessor and the cases decided thereunder. I agree that the appeal must be dismissed.

R. M. Everett for the appellant, submitted that under s. 29, sub-s. 2 of the Workmen's Compensation Act, 1925, the House should remit the matter to the Sheriff Substitute to make all necessary inquiries as to the amount of workmen's compensation payable.

A. M. Wallace for the respondents, submitted that a substantial amount of the extra costs incurred through the appellant bringing the action instead of proceeding under the Workmen's Compensation Act should be deducted from the compensation by the tribunal that assessed it.

VISCOUNT JOWITT L.C. intimated that the House was agreed that the matter should be remitted to the Sheriff Substitute to assess workmen's compensation, with a direction that he should make an allowance in respect of half the extra costs incurred.

Appeal dismissed.

Solicitors for appellant : *W. H. Thompson, for D. G. M'Gregor, W. S., Edinburgh, and Digby Brown & Co., Glasgow.*

Solicitors for respondents : *Martin & Co., for Morton, Smart, Macdonald & Prosser, W. S., Edinburgh, and Biggart Lumsden & Co., Glasgow.*

[PRIVY COUNCIL.]

J. C.*

1948

July 23.

UNION TRUSTEE COMPANY OF AUSTRALIA, LIMITED . . . APPELLANT;

AND

BARTLAM AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia — Victoria — Trustee company — Carrying on testator's business—Commission on " income received by such trustee company " —" Income " to be ascertained on ordinary accounting principles—Deduction of costs and expenses of working and managing the business —Victorian Trustee Companies Act, 1928 (19 *Geo.* 5, *No.* 3793), *s.* 17.

The word " income " in s. 17 of the Victorian Trustee Companies Act, 1928, in relation to a business carried on by a trustee company, is used in its natural and ordinary meaning of the balance of profits and gains resulting from carrying on the business ascertained on ordinary accounting principles and, in particular, after debiting the costs and expenses chargeable to revenue of working and managing the business. Accordingly, where the appellant trustee company, as executor and trustee of the will of the testator and pursuant to an express power therein contained, carried on the testator's business of grazing, the income on which the appellant trustee company was entitled to charge commission was to be calculated by deducting from the profit appearing in the appellant's livestock accounts and from the gross amount arising from the sale of wool and any other proceeds of sale of produce of the business the costs and expenses incurred for the working and managing of the grazing station properties.

Judgment of the High Court of Australia (1946) 72 C. L. R. 549, affirmed.

APPEAL (No. 45 of 1947), by special leave, from a judgment of the Full Court of the High Court of Australia (April 2, 1946) reversing a majority judgment of the Full Court of the Supreme Court of Victoria (May 25, 1945).

The following facts are taken from the judgment of the Judicial Committee. Robert Ernest de Little, who was domiciled in the State of Victoria, died on October 1, 1926, having by the joint effect of his will, dated July 30, 1924, and a codicil thereto, dated December, 17 1925, appointed the respondents Ethel Ludlow de Little, his wife, and John Ernest de Little, his son, and the appellant trustee company to be executors and trustees thereof. They duly proved his will on February 24, 1927, in the State of Victoria. It is unnecessary to state the terms of the will beyond saying that the testator bequeathed his residuary estate upon trusts (through the medium of a trust for sale with a power to postpone it) under which the respondents took certain beneficial interests, and that the will contained an express power for the trustees to carry on at their discretion any business or pursuit in which he might be engaged at his death, with wide ancillary powers including a power to commit the management to others. The testator was at his death the owner of two farming stations in Western Victoria known as Caramut South and Aringa North, of a value of about 50,000*l.*, where he carried on the business of grazing, and personal estate of a value of about 26,000*l.*, including sheep valued at 13,599*l.* 11*s.* 6*d.*, cattle valued at 3,012*l.* and horses valued at 403*l.* There were, however, outstanding mortgages and other liabilities amounting to over 27,000*l.* The trustees exercised the discretion vested in them by the will to postpone the sale of the testator's farming stations and the live and other stocks thereon, and carried on the business of grazing in continuation of that carried on by him, as regards Aringa North until the year 1931, and as regards Caramut South until June 29, 1944, when the latter property, with the live and dead stock thereon, was sold to the respondent John Ernest de Little pursuant to a provision contained in the will.

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* *Present:* LORD MACMILLAN, LORD SIMONDS, LORD NORMAND, LORD OAKSEY and LORD MACDERMOTT.

Doubts having arisen on the question what commission the trustee company was entitled to charge in respect of the income of the trust property the proceedings out of which this appeal arose were commenced by originating summons in the Supreme Court of Victoria, the trustee company being the plaintiff and the respondents the defendants. The respondent Lena Ethel Bartlam was appointed for this purpose to represent all persons beneficially interested in the residue of the estate except the other respondents. Before stating more precisely the questions that must be answered it is convenient to set out the single section of the Act on the true construction of which the issue depended and to refer to the method of accounting adopted by the trustee company. By s. 17 of the Victorian Trustee Companies Act, 1928, it was provided as follows: "17. A trustee "company shall be entitled to receive, in addition to all moneys "properly expended by it and chargeable against the estates "placed under the administration and management of such

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" trustee company, a commission to be fixed from time to time " by the directors of the said company, but not to exceed in any " case Two pounds ten shillings for every One hundred pounds " of the capital value of any estate committed to the manage- " ment of such trustee company as executor administrator " trustee receiver committee or guardian of the estate under the " Lunacy Act 1928 or as sole guarantor or surety or guardian " of any infant or lunatic, and Five pounds for every One " hundred pounds of income received by such trustee company " as executor administrator trustee receiver committee or " guardian of the estate under the Lunacy Act 1928 or as such " sole guarantor or surety as aforesaid or guardian of any infant " or lunatic or of capital or income received by such trustee " company as an attorney acting under power of attorney, and " such commission shall be payable out of the moneys or " property committed to the management of such trustee " company and shall be received and accepted by it as a full " recompense and remuneration to it for acting as such executor " administrator trustee receiver committee or guardian or as " such sole guarantor or surety as aforesaid or attorney, and " no other charges beyond the said commission and the moneys " so expended by the said company shall be made by such " trustee company. But if in any case the Supreme Court or a " judge thereof is of opinion that such commission is excessive " it shall be competent for such court or judge to review and " reduce the rate of such commission: Provided that the " commission to be charged by a trustee company shall not " exceed in any estate the amount of the published scale of " charges of the said company at the time when such estate " was committed to it. Nor shall this enactment prevent the " payment of any commission directed by a testator in his will " in lieu of the commission hereinbefore mentioned."

The rate of commission fixed by the trustee company pursuant to the section on income received by it as executor or trustee, where the annual total exceeded 400*l.*, had been 2½ per cent. per annum. The method of accounting adopted by the trustees, on the figures of which the commission on income charged by the trustee company had been calculated, was stated in the formal case presented by the trustee company compendiously and accurately as follows: " In respect of each " Station, a separate livestock account was kept for sheep, " cattle and horses. These accounts recorded the livestock " on hand at the beginning of each year and the purchases,

" natural increases and reductions by sale or slaughter during " the year; they preserved as capital flocks and herds equi- " valent in number to those existing at the testator's death " and showed as a profit or loss the surplus or deficit resulting " at the end of the year from the figures recorded for the year. " The addition to livestock in each year arose substantially " from breeding, and purchases were a small item. The balance " each year of these accounts (which on a few occasions was a " deficit) was carried into the revenue accounts which took the " form of, first, a working account for each Station and, " secondly, a combined trust income account. In the working " accounts the proceeds of sales of wool and other station " produce were combined with the balance from the livestock " accounts and from the aggregate thus obtained was deducted " outgoings including the costs and expenses of and incidental " to working and managing the Station properties. The " balance thus arrived at of the working accounts was carried " to the trust income account where the other revenues of the " trustees, such as rents and dividends, were added and general " expenses and outgoings, including interest on borrowed " moneys and appellant's commission on income, were deducted " and the balance being the amount available for beneficiaries " was transferred to the beneficiaries accounts." The commission charged by the trustee company annually in the accounts was always based on the aggregate of the items brought into the working account and the trust income account and was calculated before deducting any of the costs and expenses which were deducted in those accounts for the purpose of ascertaining the net income. Over the whole of the seventeen years the total amounts alleged to be " income " in respect of which commission was chargeable was 151,706*l.* 10*s.*, and the amount of commission in fact charged and retained was 3,792*l.* 13*s.* 8*d.*

In those circumstances the questions finally formulated for the decision of the court were as follows:

" (*a*) Should the said income [i.e., the income on which " commission is chargeable] be calculated in yearly rests from " the 1st day of October to the 30th day of September next " following? [This question has been finally disposed of.]

" (*b*) Should the said income be calculated by adding together " the amount of the profit shown on the livestock accounts " referred to in the said affidavit [being an affidavit sworn in " support of the said summons], the gross amount received by

" the plaintiff from the sale of wool, and all amounts other " than capital receipts received by the plaintiff from any " part of the estate, but without deducting therefrom any " amount for expenses or outgoings paid by the plaintiff out " of the estate ?

" (*c*) Should the said income be calculated by deducting from " the gross amount calculated as in (*b*) the costs and expenses " paid by the plaintiff in working and managing the station " properties referred to in the said affidavit but none of the " costs and expenses referred to in (*d*) ?

" (*d*) Should the said income be calculated by deducting " from the amount calculated as in (*c*), all or any and which of " the following costs and expenses paid by the plaintiff out " of the estate. . . . ." There followed an enumeration of costs and expenses which were now conceded not to be deductible for the purpose of the relevant calculation.

On those questions the Full Court of the Supreme Court of Victoria (Macfarlan and Lowe JJ., Martin J. dissentiente) on May 25, 1945, made an order declaring that the income received by the trustee company as executor and trustee of the will on which it had been since the death of the testator and was then entitled to receive commission was all amounts other than capital receipts received by it from any part of the estate of the testator without deducting therefrom any amount for expenses or outgoings paid by it out of the estate, and that it was unnecessary to answer any other questions raised by the originating summons. From that decision the present respondents appealed to the High Court of Australia (Latham C.J. and Rich, Starke, Dixon and McTiernan JJ.) which allowed the appeal and discharged that part of the order of the Supreme Court which has been stated above and in lieu thereof declared that the first question of the originating summons should be answered by saying that in so far as it related to income derived from the testator's business already mentioned the income therefrom on which the trustee company as executor and trustee was entitled to receive commission should be ascertained on ordinary accounting principles but in accordance with the following declarations or directions made or given in respect of the particular sub-questions to those questions, namely :

" (*a*) [no longer material].

" (*b*) and (*c*) for the purpose of ascertaining the income in " respect of which the plaintiff is entitled to charge com-

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" mission the amount of profit appearing from the livestock " accounts, the gross amount arising from the sale of wool " and any other proceeds of sale of produce of the business " should be credited and there should be debited the costs " and expenses incurred for the working and managing of the " station properties.

" (*d*) None of the items of costs and expenses enquired " about in sub-paras. (i.) (ii.) (iii.) (iv.) (v.) and " (vi.) of para. (*d*) of the first question should be debited or " deducted."

From that order the trustee company, by special leave, appealed to His Majesty in Council, submitting that it was wrong in so far as it declared that, for the purpose of ascertaining the income on which commission was chargeable, the costs and expenses incurred in the working and management of the testator's station properties ought to be debited as thereby directed.

1948. June 21, 22, 24. *Sir Cyril Radcliffe K.C.*, *Pascoe Hayward K.C.* and *J. H. Stamp* for the appellant. Section 17 of the Victorian Trustee Companies Act, 1928, deals wholly with trustee companies, and put quite generally, the point is whether the income which they are to take for calculating their commission for their remuneration is the gross or the net income, i.e., the income resulting after deducting the expenses of working and managing the business from the gross receipts. The natural approach to a commission in respect of work of this kind is to base it on gross receipts. The appellant claims that it is entitled to calculate its commission on the gross proceeds of the sale of the wool and any other produce of the business, and on the annual gross profit on the livestock, which, very roughly speaking, represents the annual increase in the flocks. In *In the Will of Matheson* (1) it was held that the trustees were not entitled to commission on the gross, but only on the net, proceeds of the business, but that was a decision as to what in a particular case the judge had to find was reasonable under the Act then before him—Act No. 427, s. 25—and it is not intended to be a guide on the general question of construction. *In re McIntosh* (*No.* 3) *Perpetual Trustee Co., Ld.* v. *McIntosh* (2), a case under the Perpetual Trustee Company Limited Act (52 Vict., s. 13), does not give any assistance as to the meaning of " income " in a section of the

(1) (1887) 13 V. L. R. 587, 589.
(2) (1903) 4 St. R., N. S. W. 59.

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present nature. In *In re Edments. The Trustees, Executors and Agency Co., Ld.* v. *James* (1), which was a decision on this particular Act, it was held that the income on which the company was entitled to receive commission under s. 17 was the net income after making all proper deductions for expenses, " it is not entitled to commission on either the gross receipts or " the gross profits of the business." It is submitted, however, that all receipts for the purposes of this section must be capital or income, but when a receipt emerges from the disposition of an estate which is properly described as circulating capital that receipt has to be divided between income and capital—that is the real difficulty in dealing with such a receipt. Income means everything that is received which is not a capital receipt. Income received is not a computed sum which is the balance between receipts and expenditure, it is the gross sum represented by what comes in. It is a matter of how to apply the terms of s. 17 to the circumstances of this case rather than a question of construction. Provision is made in favour of the beneficiary where the trustee gets an unfair amount from the estate—the court has a discretion to reduce it—but there is no compensating provision where the trustee gets inadequate remuneration. It is unreasonable to allow the same rate of commission for receiving and distributing income from ordinary investments, and for the work and personal responsibility involved in earning and distributing net profit of equal amount from a sheep and cattle station. If the legislature had intended the commission to be on the net result of running the business it would have been natural to put in the section a power in the trustee to ask for a raising of the statutory limit. By " income " received " they are contemplating only what is received in terms of money which has been paid into the trustee's hands and which it has become responsible for. There is not therefore in contemplation income which is the profit figure in any true sense, for that is not what is received, but is a computed balance between receipts and expenditure. It is not a relevant consideration in dealing with the construction of the section that the method by which the business is conducted may have a considerable effect on the sum on which commission is claimed, and may, indeed, establish a conflict of interests, and any such consideration is outweighed by the provision for reduction of the commission and the absence of a counter advantage to the trustee. The moneys received from the sale

(1) [1936] V. L. R. 272.

of annual produce must be income received; it could not be a capital receipt. With regard to the more difficult question of the moneys received from realization of stock-in-trade—from the sale of sheep—the problem is whether those moneys are to be described as capital or income, and if it is not wholly one or the other, the basis on which what is capital and what income has to be computed. It is the problem of fixed and circulating capital. Latham C.J. in the High Court said that "the gross amount received over the counter for stock sold "cannot be regarded as income. Part of it represents a "replacement of capital." Part of the moneys realized on the sale of stock may possibly represent a sale of capital, but it is submitted that none of it necessarily is. Again the Chief Justice said that "this [sheep] account takes the sheep at "conventional values and shows upon this basis a gross "profit representing an increase in the value of sheep during the "year of 2,134*l*., which was transferred to the credit of the "working account. This sum of 2,134*l*. must, in part, be "applied in replacement of the working expenses and the fund "which supplies those working expenses, being spent and "recovered and re-spent from time to time, is part of the "circulating capital of the station. So far as the amount of "2,134*l*. makes such a replacement it is not an income receipt." It is submitted, with respect, that the argument there used to displace the appellant's claim is wrong. It is submitted that as a matter of accountancy the expenses of working and managing the business are not charged against capital but against revenue. The income received by the appellant, on which it is entitled to charge commission, includes the whole of the income received at the testator's grazing stations, and not merely so much of it as is ultimately found to constitute net profit.

Pascoe Hayward K.C. followed.

Sir Andrew Clark K.C. and *Wilfrid Hunt* for the respondent Lena Ethel Bartlam. The question is primarily, if not entirely, one of the construction of s. 17 of the Act of 1928, and the first point is, what does the word "income" in the section mean in relation to a business carried on by executors or trustees, because it may mean something quite different when used in relation to the income of the estate as a whole. Section 17 does not visualize an executor carrying on a business. "Income" in the section in relation to a business carried on by an executor must mean the income of that business, and having got that far, one must look at what is the ordinary commercial meaning of the income of a business, and it is the net gains and profits of the business. It is certainly not the gross receipts. " Income " must mean either everything that comes in, or some narrower meaning, namely, net profits and gains, and the real point here is whether or not outgoings have to be deducted. The commission is on " income received " ; it must be income actually and in fact received by the executors and trustees, and a mere paper profit, such as the increase in a capital asset, is not a receipt at all. It has to be received by such trustee in its capacity as " executor, administrator, etc. " ; it is only the net profits of the business that are ever received by the trustee in its capacity as executor. It was said that it would be grossly unfair to be tied down to this small commission for running and managing the business. The answer is that the trustee company has its chance to stipulate for a special commission under the last part of s. 17. If it does not do that, there is no obligation on it to accept the trust at all. If the meaning of income is net profits, all questions of difficulty are overcome, for profits can never be capital, and all difficulties of separating capital from income do not arise. Further, to accept a construction which meant that the trustee company could get remuneration on its receipts without allowing for outgoings would put it in a position where its interests would conflict with those of the beneficiaries, and prima facie in the circumstances any construction which would have that result is not a natural one. Exactly the same conclusion as to the meaning of " income " is reached by the reasoning of the High Court ; in arriving at the net profit there is no difference between a retail business, a factory and a farm. The second point is, assuming it did mean gross receipts, then can it be said that they are received by the executors as executors ? Their remuneration is only for acting as executors and trustees and not in any other way, and it is remuneration only on income which is received by them in that capacity. If they elect to manage the business themselves they cannot get any more remuneration for doing so than they would have got if they had employed a manager. They only receive as executors and trustees the net receipts that would have been received had they employed a manager. It is a business within a business. So, on the true construction of s. 17 " income " means net profits and gains, and cannot be so construed as to include any capital element, and if it is given a wider construction than net profits and gains it must of necessity contain some capital element. For the meaning of "income" see *Attorney-General of British Columbia* v. *Ostrum* (1). Then there are the company cases: dividends cannot be paid out of capital, and therefore it is necessary to replace floating capital before the sum available for payment of dividends can be ascertained: *Verner* v. *General and Commercial Investment Trust* (2). Reliance is placed on the analogy that what cannot be done in the present case is to pay commission on capital; *Dovey* v. *Corey* (3); *Bond* v. *Barrow Hæmatite Steel Company* (4) and *Ammonia Soda Company* v. *Chamberlain* (5)—that passage is directly material in the present case; there is no difference in principle in the case of natural and artificial produce, and it is not until the capital asset has been converted into cash and after the floating capital has been repaid, that it can be ascertained whether there has been any income.

Wilfrid Hunt followed. If the appellant is right, then in respect of the years when there was a loss, the commission would have to come out of capital on which they had already received commission.

Sir Cyril Radcliffe K.C. replied. There is nothing in the dividend cases cited for the respondent which affects the present question. *Attorney-General of British Columbia* v. *Ostrum* (1) could not amount to any judicial statement as to what is the income of a business. There is no incongruity or even matter for surprise in the fact that the sum on which the appellant claims to calculate its commission includes the amount which it paid out in current expenditure. There is nothing on construction of s. 17 which puts the appellant outside the range of the section. This distinction of managership is a false one, and there is nothing in the idea of a business within a business. What is involved is not the income of a business as an entity apart from the estate; it is the income of the estate of which the trustee is made the owner, received from the assets of the estate which it is engaged to administer. The construction of s. 17 as applying to the circumstances of this case has previously passed through the Australian courts, and nobody has doubted that s. 17 is intended to apply to the position of a trustee company as in this case.

(1) [1904] A. C. 144, 147.
(2) [1894] 2 Ch. 239, 267.
(3) [1901] A. C. 477, 493.
(4) [1902] 1 Ch. 353, 364, 367.
(5) [1918] 1 Ch. 266, 286.

July 23. The judgment of their Lordships was delivered by LORD SIMONDS. This appeal by the Union Trustee Company of Australia, Ld., which will be called "the trustee company," from a judgment of the High Court of Australia raises a question of some importance on the construction and effect of s. 17 of the Victorian Trust Companies Act, 1928. The relevant facts are not in dispute.

[His Lordship then stated the facts set out above and continued :] From the statement that has already been made of the questions raised and the declarations made by the Supreme Court of Victoria and the High Court of Australia it is clear that however much the argument may be elaborated the narrow point is what, on the true construction of s. 17 of the Act, is the meaning of the words "income received by such "trustee company as executor administrator trustee, etc." where they occur in that section. Whatever view may be taken of the meaning of those words, there may be difficulty in its application to particular circumstances, but it may be said generally that the difference of opinion between the Supreme Court of Victoria and the High Court of Australia lies in the fact that the latter court holds that in relation to a business carried on by a trustee company the relevant words mean an amount which cannot be ascertained until the expenses of carrying it on so far as they are chargeable to revenue have been brought into account.

With the conclusion of the High Court their Lordships are in full accord. But as the question is said to be one of general importance in Australia they think it right to make these observations. They would first observe that neither in s. 17 nor in any other section of the Act is there any reference to a business being carried on by a trustee company. An executor or trustee has generally no power to carry on his testator's business except so far as is necessary for winding it up, unless the will itself authorizes him to do so. It is therefore not surprising that the section which provides for remuneration does not expressly deal with the case where the trust property consists of a business which the trustee company is authorized to carry on. Their Lordships have no doubt that, had such a case been within the contemplation of the legislature, special provision would have been made for it and the ambiguity, which has caused a difference of opinion in the courts of Australia, would have been avoided. Meaning and effect must, however, be given to the section in an unforeseen context and the question is, what is income received by a trustee company as trustee where it carries on a business. The nature of the business, trading, manufacturing or merchanting, and the method of accounting adopted in any particular case are alike irrelevant to this question of construction. It appears to their Lordships that there are only two possible meanings that can be attributed to the relevant words ; (*a*) that they include all receipts properly entered on the revenue side of the account of the business, or (*b*) that they mean the balance of profits and gains ascertained according to ordinary methods of accountancy. To the first of these meanings the trustee company is logically driven and, indeed, commits itself in the formal reasons of the case that it presents to the Board. But, as appears from the statement already made of the method of accounting adopted by it, there is brought into the account as income any surplus on the livestock accounts which is reached not by any cash receipts but as the result of a calculation of numbers of livestock and an arbitrary though convenient valuation of them. No doubt is cast on the propriety of this method of accounting whether for tax purposes or as between the persons interested in the trust property. But it is clear that, if the meaning of " income " in s. 17 is that for which the trustee company contends, there can be no justification for treating as income that which is a notional profit and nothing more. Rather, to be consistent, the trustee company should, just as it treats as income the gross proceeds of wool, treat also as income the proceeds of sale of every head of stock that it sells, but apart from such sale bring nothing into income account. But a construction which leads to such a result, seen, indeed, in its nakedness in the case of the gross proceeds of sale of wool, but even more startling in the case of a business, where the turnover might take place many times in a year, or in the case of a manufacturing business, where the return for each article manufactured might represent a very small margin over the cost of production, is one that their Lordships would not readily adopt where the subject-matter is the remuneration of one who stands in a fiduciary relation to his beneficiary. It was urged that if the result was an excessive commission, a remedy was provided by the section in that the beneficiary might apply to the court for its reduction. But this does not appear to be an adequate justification for adopting such a construction if another is reasonably tenable.

Their Lordships then turn to the alternative suggested construction. Since it is the income of the trust property on which a commission is chargeable and ex hypothesi the trust property is a business and there need be no other trust property, it is difficult to avoid the conclusion that the section must propter subjectam materiam be read as referring to the income of or from the business received by the trustee. In other contexts the word " income " may bear other meanings, but that in relation to a business it means substantially the balance of profits and gains which results from carrying on that business appears to be indisputable. It is true that in *Lawless* v. *Sullivan* (1), where it was said " There can be no doubt that, " in the natural and ordinary meaning of language, the income " of a bank or trade in any given year would be understood to " be the gain, if any, resulting from the balance of the profits " and losses of the business in that year," the context was an income tax Act. But it appears to their Lordships that, whatever the context, if the question is asked, what is the income of or from a business, the answer must be substantially the same, and it neither adds to nor detracts from that meaning that the words " received by the trustee " follow. Their Lordships then conclude that in its present context the word " income " in relation to a business is used in what they concur in thinking is its natural and ordinary, or (as Martin J. said in the Supreme Court) in its popular, meaning. If so, it is not disputable that in the present case it can only be ascertained, as the order of the High Court directs, on ordinary accounting principles and, in particular, after debiting the costs and expenses of working and managing the station properties. It was urged against this view that the result might be that in a bad year the trustee company would as the reward of much hard work and anxiety get little remuneration or none at all. This argument is of little weight. It is not obligatory on a trustee company to accept a trust. If it appears likely, taking one year with another, to be unremunerative, it can decline to do so. And, as a practical matter, it will usually be consulted before appointment and may then bargain for a proper remuneration, if it is to undertake the carrying on of a business. The section itself contemplates and permits such an event.

No cross-appeal having been raised, their Lordships think it unnecessary to say more than that they respectfully concur in the views expressed by the High Court that none of the items mentioned in question 1 (*d*) of the originating summons is

(1) (1881) 6 App. Cas. 373, 378.

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deductible in ascertaining the income on which commission is chargeable. Their Lordships would not be thought wanting in respect to the learned judges of the High Court if they do not fully discuss the reasoning which has led them to the same conclusion as that now adopted. It is significant that the result is the same. For this is just because income in its "natural and ordinary" meaning is an amount that is only ascertainable by the process which is elaborately pursued in the judgments of Latham C.J. and Dixon J., and particularly by making the adjustments between capital and income which are a familiar feature of proper accountancy. They adopt as a summary of their own views the words of Dixon J. "the gross "returns from the pastoral business forming part of the estate "cannot properly be described as income and it is only the net "balance ascertained according to the usual and recognized "principles of accounting that answers the description."

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the first respondent's costs of the appeal, such costs to be taxed as between solicitor and client in accordance with the conditions imposed when special leave to appeal was granted.

Solicitors for appellant: *Coward, Chance & Co.*

Solicitors for respondent, Lena Ethel Bartlam: *Blyth, Dutton, Wright & Bennett.*

H. L. (E.)*
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Apr. 19, 20, 22, 23: *July* 14.

Applied. INLAND REV. COMMRS. *v.* DOWDALL O'MAHONEY & CO. LD. [1952] A.C. 401

[HOUSE OF LORDS]

SMITH'S POTATO ESTATES LIMITED . APPELLANTS;

AND

BOLLAND (INSPECTOR OF TAXES) . RESPONDENTS.

SMITH'S POTATO CRISPS (1929) LIMITED APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—Income tax—Excess profits tax—Deductions against profits—Litigation to reduce tax assessment—Legal and accountancy expenses—Whether "money wholly and exclusively laid out or expended for "the purposes of the trade"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40) *sch. D., Rules Applicable to Cases I. and II., r.* 3 (*a*).

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* *Present:* VISCOUNT SIMON, LORD PORTER, LORD SIMONDS, LORD NORMAND and LORD OAKSEY.

H. L. (E.)

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SMITH'S POTATO ESTATES, LD. *v.* BOLLAND (INSPECTOR OF TAXES).

SMITH'S POTATO CRISPS (1929), LD. *v.* INLAND REVENUE COMMISSIONERS.

Legal and accountancy expenses incurred by a trader in contesting the amount of an assessment to excess profits tax are not allowable as deductions in computing profits for the purposes of a subsequent assessment to income tax or excess profits tax; they are not "money wholly and exclusively laid out and expended for the "purposes of the trade" within r. 3 (*a*) of the Rules Applicable to Cases I. and II. of sch. D. to the Income Tax Act, 1918, inasmuch as they were incurred, at any rate in part, to determine the current amount of tax and not to earn gain.

So held per LORD PORTER, LORD SIMONDS and LORD NORMAND, VISCOUNT SIMON and LORD OAKSEY dissenting.

Decision of the Court of Appeal affirmed.

CONSOLIDATED APPEALS from the Court of Appeal (Lord Greene M.R., Morton and Somervell L.JJ.).

The facts, stated by LORD PORTER, were as follows: The appellant company in the first appeal was a wholly owned subsidiary of the appellant company in the second appeal. The first appellant company was formed to purchase and manage an estate at Nocton in Lincolnshire, on which it was hoped to grow a supply of potatoes sufficient for the requirements of the second appellants. That estate, before its purchase, had been managed by Mr. Young and, in order to ensure its successful working, it was thought essential to continue to employ him for that purpose. After four years' service Mr. Young was dissatisfied with the terms of his remuneration and on March 4, 1941, a new agreement was entered into between him and the first appellants for a term of six years certain from April 6, 1940, and thereafter until determined by six months' notice on either side. Under this agreement he received an increased remuneration amounting in 1940 to 3,550*l*., in 1941 to 6,486*l*., in 1942 to 6,198*l*., in 1943 to 5,334*l*., in 1944 to 5,747*l*. and in 1945 to 2,416*l*. On August 15, 1942, the Commissioners of Inland Revenue issued to the secretary of the first appellants a notice stating that under s. 32 of the Finance Act, 1940, they had decided that in computing for the purposes of excess profits tax the profits of that company's trade or business for the accounting period ending March 31, 1941, no deduction should be allowed in respect of Mr. Young's remuneration in excess of 3,500*l*. His services being regarded as of great importance by the first appellants, who feared that they might be lost if in the year in question and in future years any part of his remuneration should be disallowed, both companies appealed from this decision to the Board of Referees and that body

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held that 5,800*l.* was allowable. From and after that period the Inland Revenue authorities did not challenge the allowance of the full amount actually paid and the sum now in dispute represented the costs incurred in prosecuting this appeal. The legal and accountancy expenses so incurred amounted to 622*l.* 10*s.* 11*d.*

The first appeal herein arose out of an appeal by the first appellants to the Commissioners for the Special Purposes of the Income Tax Acts against an assessment to income tax under Case I. of sch. D. for the year 1944/45. They contended that the sum of 622*l.* 10*s.* 11*d.* was an admissible deduction in computing their profits for assessment to income tax. The Commissioners held: "(1.) Having regard to the "observations of Lord Greene M.R. and of Viscount Simon "L.C., Lord Macmillan and Lord Wright as to the general "nature of excess profits tax in *In re G. B. Ollivant & Co.* "*Ld.'s Agreement* (1) and *L. C. Ld.* v. *G. B. Ollivant & Co.*, "*Ld.* (2), we do not think that the present case is dis-"tinguishable from *Allen Brothers & Co.* v. *Farquharson* (3) "merely because the appeal in question was against a decision "of the Commissioners of Inland Revenue in relation to excess "profits tax and was not against an assessment to income "tax. (2.) The present case differs, however, in that (i.) "although the appeal itself had reference only to the "taxation of excess profits tax earned, it had, or might have, "a direct bearing on the taxation of subsequent excess profits, "and (ii.) by reason of this there was, in the exceptional "circumstances, a special 'business' motive for prosecuting "the appeal, namely (in effect) the protection of the benefit "of Mr. Young's services to the company—a matter going to "the earning, as distinct from the taxation of future profits ". . . . (3.) Nevertheless, the immediate purpose of the "appeal was that of all taxation appeals, namely to get a "reduction of tax, or, in other words, to retain a larger share "of the profits. We regard this as a substantive purpose in "itself, and not as something merely incidental to the earning "of future profits. We therefore hold that the costs of the "appeal to the Board of Referees were not money 'wholly "'and exclusively' laid out or expended for the purposes of

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(1) [1942] 2 All E. R. 528, 532; 21 A. T. C. 317, 320.

(2) (1944) 60 T. L. R. 336, 338, 340, 341; 23 A. T. C. 54, 57, 60, 62–3.

(3) (1932) 17 Tax Cas. 59.

"the trade within r. 3 (*a*) of Cases I. and II. and were not "a 'loss' within r. 3 (*e*). Accordingly we dismiss the "appeal . . . ."

The second appeal herein arose out of an appeal by the second appellants to the Commissioners for the Special Purposes of the Income Tax Acts against an assessment to excess profits tax made on them in respect of the profits of their subsidiary, the first appellants. The sole question was whether the sum of 622*l.* 10*s.* 11*d.* was an admissible deduction in computing the profits of the first appellants for assessment to excess profits tax. For the reasons set out in the other case, the Commissioners dismissed the appeal.

In each case there was an appeal by way of case stated to the King's Bench Division. Atkinson J. allowed the appeals, but the Court of Appeal having reversed his decision, the appellants appealed to the House of Lords.

Grant K.C. and *Tribe* for the appellants. The costs expended in contesting the assessment to excess profits tax are deductible in computing profits for the purposes of income tax and excess profits tax for the year of assessment now in question. By s. 18, sub-s. 1, of the Finance (No. 2) Act, 1939, the amount of excess profits tax payable in respect of a trade is allowed to be deducted as an expense in computing the profits of the trade for the purposes of income tax. (No doubt income tax is not similarly deductible because, if it were, the repetition of the deduction would reduce it to an. indefinite process.) It follows from that sub-section that expenditure incurred for the purpose of reducing the amount of excess profits tax payable in respect of the trade is likewise properly deductible as an expense in computing the profits of the trade or business for the purposes of income tax. Further, excess profits tax is a tax imposed on the trader as a trader and on no one but traders and accordingly any costs incurred in ascertaining the amount of the obligation are moneys "wholly and exclusively laid out for the purposes "of the trade" within r. 3 (*a*) of the Rules Applicable to Cases I. and II. of sch. D. to the Income Tax Act, 1918. Anything properly expended by a trader in doing something imposed on him because he is a trader is expended for the purposes of the trade. Every expense to which he is put because he carries on the trade is included. Similarly, since the law obliges the trader to pay income tax, his expenses of

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calculating the balance of profits and gains for income tax purposes are incurred wholly and exclusively for the purposes of his trade, more particularly when the taxpayer is a company which by law is compelled to publish its accounts. Even the amount available to be put aside as a reserve or for distribution in dividends cannot be ascertained until it is known what sum must be provided for excess profits tax and income tax purposes. It is the practice to allow accountancy charges as expenditure for the purposes of trade and once it is conceded that the costs of preparing accounts after the end of the trading year are deductible expenses, the Crown's whole argument collapses. The expenses of accounts and balance sheets are deductible because they represent one of the taxpayer's necessary duties as a trader. Another of his obligations is to pay excess profits tax. There is no distinction between the trader as opposed to the taxpayer and what Lord Greene M.R. said in *Rushden Heel Co., Ld.* v. *Inland Revenue Commissioners* (1) was wrong. Here the appellants are both traders and taxpayers all the time and the appeal to the Board of Referees was all part of ascertaining the first appellants' tax liability as traders. Accordingly the costs were money wholly and exclusively laid out for the purposes of their trade. Further, the real reason why the appeal was initiated was to retain the services of Young, and that was why the expenses were incurred. In the exceptional circumstances of this case there was a special business motive for this and the matter went to the earning of future profits as distinct from the taxation of past profits. In para. 2 of their finding the Commissioners accepted this motive, and para. 3 is inconsistent with this. The Crown's case is based on a misconception of Lord Davey's words in *Strong & Co. of Romsey, Ld.* v. *Woodifield* (2), due to taking them out of their context. From this arises the supposed antithesis between money expended to earn profits and money expended after the profits have been earned. *Allen* v. *Farquharson Brothers & Co.* (3) was likewise based on Lord Davey's observations, and merely follows it, but what Finlay J. said (4) with regard to the allowing of accountancy expenses is in favour of the appellants' contention: see also Romer L.J. in *Worsley Brewery Co., Ld.* v. *Inland Revenue Commissioners* (5).

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(1) [1947] 1 All E. R. 699, 702; 26 A. T. C. 116, 117.

(2) [1906] A. C. 448, 453.

(3) (1932) 17 Tax Cas. 53.

(4) Ibid. 65.

(5) (1932) 17 Tax Cas. 349, 360.

Further, Lord Davey's words, as interpreted by the Crown, are at best dicta and are inconsistent with the principles of *Smith* v. *Lion Brewery Co., Ld.* (1) and *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2) and with what was said in *British Insulated and Helsby Cables, Ld.* v. *Atherton* (3). *Inland Revenue Commissioners* v. *Alexander Von Glehn & Co., Ld.* (4) was very far from the facts of the present case. [They also referred to *G. Scammell & Nephew, Ld.* v. *Rowles* (5); *Inland Revenue Commissioners* v. *Scottish Central Electric Power Co.* (6) and *Southern* v. *Borax Consolidated, Ld.* (7).]

Sir Frank Soskice S.-G. and *Reginald Hills* for the respondents. The costs of the appeal to the Board of Referees were not an expense which could be deducted in computing the profits of the trade for the purposes of income tax, not being moneys wholly and exclusively laid out for the purposes of the trade within r. 3 (*a*) of the Rules Applicable to Cases I. and II. of sch. D. of the Income Tax Act, 1918. These expenses were not incurred by the first appellants solely or mainly in their capacity as traders but were incurred solely or mainly as taxpayers. They were not expenses of a commercial character incurred in carrying on the trade but were incurred in the course of ascertaining the amount of excess profits tax for which the first appellants were liable as the result of having carried on that trade. Whereas the tax on the profits of a trade cannot itself be an expense to be deducted in computing the profits of the trade liable to the tax, the expense of ascertaining the amount of the tax in accordance with the statutory code is equally not an expense to be deducted in computing the profits liable to the tax. No expenses connected with taxation are deductible, because they are not expended "for the purposes of the trade." Those words are limited to the purpose of earning profits of the trade by the operations of the trade. One does not carry on a trade for the purpose of paying income tax or excess profits tax. In so doing one is not carrying on an operation of the trade but doing something entirely outside it. Expenses referable to tax purposes are, therefore, not deductible, because neither the payment nor the recovery of tax is an operation of the trade.

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(1) [1911] A. C. 150.
(2) [1915] A. C. 433.
(3) [1926] A. C. 205, 211, 212.
(4) [1920] 2 K. B. 553.
(5) [1939] 1 All E. R. 337; 22 Tax Cas. 479.
(6) 1931 S. C. (H. L.) 36; 15 Tax Cas. 761.
(7) [1941] 1 K. B. 111.

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It brings no customers to the trader's door. Not every expense which is advantageous to a man's trade is made "for the "purposes of the trade." The expenses which he is prohibited from deducting are all expenses not wholly and exclusively made for the purposes of the trade. Payment of workmen's compensation being a necessary incident of a trade requiring the employment of others, payments made in respect of it are a trade expense and a legitimate deduction, since they are germane to the trading operation like payment of wages. But other payments of a different character have been held not to be deductible: see *Union Cold Storage Co., Ld.* v. *Jones* (1); *Hagart & Burn-Murdoch* v. *Inland Revenue Commissioners* (2); *Spofforth* v. *Golder* (3) and *Norman* v. *Golder* (4) In the last-named case the taxpayer should clearly have succeeded if the contentions of the present appellants were right. The dictum of Lord Davey in *Strong & Co. of Romsey, Ld.* v. *Woodifield* (5) has been relied on over and over again in subsequent cases and is a guiding principle. In his opinion Lord Davey was adopting the argument advanced by the Crown (6): see also Collins M.R. (7) when the case was in the Court of Appeal. Lord Davey's dictum was followed in *Inland Revenue Commissioners* v. *Warnes & Co., Ld.* (8) and *Inland Revenue Commissioners* v. *Alexander Von Glehn & Co., Ld.* (9) and the reasoning in the opinions in the House of Lords was applied. [They also referred to *Usher's Wiltshire, Brewery, Ld.* v. *Bruce* (10), *L. C. Ld.* v. *G. B. Ollivant & Co. Ld.* (11) and Income Tax Act, 1918, ss. 100 and 149, sub-s. 4.]

Reginald Hills following. The expenses in question were not made in the first appellants' capacity as traders. A person does not pay tax as a trader but as an individual. Tax paid to the Crown is not a trade outgoing. In paying it the trader is not dealing with a customer. Successful litigation as to a question of tax does not increase the trading profits of the trader liable to be taxed. Logically the appellants' argument would lead to the conclusion that whenever tax is paid that is a legitimate deduction from profits. The question is one of degree and the courts must look at the words "for the purposes

(1) (1923) 129 L. T. 512; 8 Tax Cas. 725.

(2) [1929] A. C. 386.

(3) (1945) 173 L. T. 77; 26 Tax Cas. 310.

(4) (1944) 114 L. J. (K. B.) 108; 26 Tax Cas. 293.

(5) [1906] A. C. 443, 453.

(6) Ibid. 450.

(7) [1905] 2 K. B. 356.

(8) [1929] 2 K. B. 444.

(9) [1920] 2 K. B. 553.

(10) [1915] A. C. 443, 444.

(11) (1944) 60 T. L. R. 336, 338 340, 341; 23 A. T. C. 54, 57, 60, 62.

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" of the trade " not in the air but in the context of the Acts relating to this subject, to decide whether a particular outgoing is part of the trading activity. What is to be deducted is the expenses of carrying on the business: see *Russell* v. *Town & Country Bank, Ld.* (1); *City of London Contract Corporation* v. *Styles* (2); *Gresham Life Assurance Society* v. *Styles* (3); *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (4) and *Mersey Docks and Harbour Board* v. *Lucas* (5). [He also referred to *Archibald Thomson, Black & Co., Ld.* v. *Batty* (6); *Union Cold Storage Co., Ld.* v. *Jones* (7); *Inland Revenue Commissioners* v. *Scottish Central Electric Power Co.* (8); *Mitchell* v. *B. W. Noble, Ld.* (9) and *Coltness Iron Co.* v. *Black* (10).]

Grant K.C. in reply. The whole argument for the Crown is based on ignoring the words of r. 3 (*a*) and taking the words of judges in cases where the facts and the arguments were different. The words " for the purposes of the trade " must cover the expense of performing obligations imposed by statute on the trader because he is trading. " Purpose," as defined by the Oxford English Dictionary, is: " The action or " fact of intending or meaning to do something; intention, " resolution, determination." [He referred to *Stevens* v. *Durban-Roodeport Gold Mining Co., Ld.* (11) and the Finance Act, 1920, s. 27, sub-s. 4.]

The House took time for consideration.

July 14. VISCOUNT SIMON. My Lords, I have had the advantage of studying the opinions prepared by my colleagues who sat with me in hearing the arguments in these consolidated appeals, and, as these opinions are not unanimous, I feel that I should briefly express my own conclusion, even though this will not affect the ultimate result. It is not necessary for me to set out the detailed facts in these two cases: they are fully stated in the opinion about to be delivered by my noble and learned friend Lord Porter.

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(1) (1888) 13 App. Cas. 418, 424.

(2) (1887) 2 Tax Cas. 239, 243, 244.

(3) [1892] A. C. 309, 317, 318, 321.

(4) [1914] 1 K. B. 357, 365–6; [1915] A. C. 433, 444, 452–3, 458, 468, 472–3.

(5) (1883) 8 App. Cas. 891, 905, 905–6.

(6) 1919 S. C. 289; 7 Tax Cas. 158.

(7) (1923) 129 L. T. 512; 8 Tax Cas. 725.

(8) 1931 S. C. (H. L.) 36; 15 Tax Cas. 761.

(9) [1927] 1 K. B. 719.

(10) (1881) 6 App. Cas. 315, 327; 1 Tax Cas. 287, 307, 314.

(11) (1909) 100 L. T. 481; 5 Tax Cas. 402.

The main question to be decided is whether the legal and accountancy expenses of prosecuting an appeal (in this instance, a successful appeal) to the Board of Referees against a decision of the Commissioners of Inland Revenue under s. 32 of the Finance Act, 1940, incurred by a taxpayer with a view to reducing the assessment made upon him as a trader for excess profits tax, can be deducted as being a disbursement "wholly "and exclusively laid out or expended for the purposes of "the trade." (Rule 3 (*a*) of the Rules applicable to Cases I. and II. of sch. D.) The Commissioners had fixed the proper figure for an item of disbursement at 3,500*l.*: the result of prosecuting the appeal, at a cost of 622*l.* 10*s.* 11*d.*, was to establish that the proper figure was 5,800*l.* Atkinson J. held that the expense of 622*l.* 10*s.* 11*d.* was an admissible deduction, on the ground that the cost of the litigation was incurred for the purpose of ascertaining the true figure of profits on which the trader must bear excess profits tax. The Court of Appeal (Lord Greene M.R., Morton and Somervell L.JJ.) reversed this decision, holding that the disbursement was not "wholly and exclusively" incurred for the purposes of the trade, but was, at any rate in part, incurred in an endeavour to reduce the amount of tax which the taxpayer had to pay.

It is to be observed that the size of the figure to be deducted —5,800*l.* instead of 3,500*l.*—not only affects the correct calculation of excess profits tax for the year but also the adjustment later on of the total burden of such tax to be borne by the trader. Moreover, since excess profits tax is deductible as an expense when calculating the proper assessment of the trader to income tax, the fixing of a correct figure for the former is essential to the correct calculation of the latter. And it is only when the latter is ascertained that the trader knows how much of his commercial profit he can carry forward, or, if a company, how much of the year's profit is available for dividend or for reserve. It seems to me that it is essential for the proper carrying on of a trade that the trader should know what portion of his profits in a given year is left to him after the Revenue has taken its share by taxation. If, therefore, he considers that the Revenue seeks to take too large a share and to leave him with too little, the expenditure which the trader incurs in endeavouring to correct this mistake, is a disbursement laid out for the purposes of his trade. If he succeeds, he will have more money with which to earn profits next year. It is true that the *result* of his success is to reduce the tax he has to pay—alternatively one may say that the result is to show that the profit of the year's trading left to him after paying tax is greater than the Revenue was willing to admit—but to my mind the *purpose* was a trading purpose and nothing else. The trade is not to be regarded as extending over twelve months and no more : indeed, as I have already pointed out, excess profits tax is liable to be adjusted in the light of subsequent trading results, and assessment for income tax is arrived at on figures of the previous year.

With all respect to those who think otherwise, I regard it as fallacious to argue that the trader's expenditure in fighting the Revenue's assessment is not "wholly and exclusively" incurred for the purposes of the trade, because the expenditure would not be incurred if there was no tax to pay. If there was no tax to pay, the benefit realized by the trader from carrying on the trade would not be reduced by taxation, and it is the purpose of trade (at any rate under private enterprise) to make its legitimate profit. Viewed in this light, I do not see why the expenditure here in question is not wholly and exclusively laid out for the purposes of the trade—if it had not been incurred, the trade would be less profitable. Lord Davey's gloss on the words of the statute in *Strong & Co. of Romsey, Ld.* v. *Woodifield* (1) is well known. but I think it is better to concentrate on the statutory words themselves. Rightly understood, however, I do not find that Lord Davey's words contradict the view that I am disposed to take. *Strong & Co. of Romsey, Ld.* v. *Woodifield* (2) was a case in which the taxpayer sought to deduct a loss not connected with or arising out of his trade. Lord Loreburn L.C. said (3) : "I think only such losses can be deducted as are connected "with in the sense that they are really incidental to the trade "itself." Lord Davey's test was that the purpose of the expenditure must be "the purpose of enabling a person to "carry on and earn profits in the trade." (1) Here, the expenditure was, in my view, incurred for the purpose of carrying on and earning profits in the trade, for a reduction in the amount of tax does increase the fund in the trader's hands after tax is paid and so promotes the carrying on of the trade and the earning of trading profits. The incidental consequence that the trader is not taxed so heavily in respect of his profits from trade does not, as it seems to me, alter the fact that the litigation was wholly and exclusively undertaken for the purposes of the trade. My own opinion, therefore, would be that the appeal should be allowed, but in view of the opinion of the majority of your Lordships I move that it be dismissed with costs.

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(1) [1906] A. C. 448, 453.
(2) Ibid. 448.
(3) Ibid. 452.

LORD PORTER. My Lords, these consolidated appeals raise the question whether in computing their profits for income tax purposes in respect of the year ending March 31, 1944, the appellants in the first appeal are entitled to deduct a sum of 622*l.* 10*s.* 11*d.*, being the legal and accountancy expenses incurred in prosecuting an appeal to the Board of Referees against a decision of the Commissioners of Inland Revenue, given under s. 32 of the Finance Act, 1940. These appellants are a wholly owned subsidiary of the appellants in the second appeal and the matter for decision in that case is whether the same sum is deductible in computing the profits of the first appellants for the purpose of assessment to excess profits tax for the chargeable accounting period ending on the same date. Under the provisions of para. 2 of Part I. of sch. V. to the Finance Act, 1940, assessments to excess profits tax in respect of the profits of the first appellants fall to be made on the second appellants but with a provision under para. 8 of Part IV. of that schedule for the reimbursement by the first appellants of the second appellants if they pay the tax.

Under sch. D. tax is charged in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom and the relevant statutory provisions as to the deductions to be allowed are to be found in r. 3 (*a*) of the Rules applicable to Cases I. and II. of sch. D. and read as follows :—" In computing the amount of the profits or gains " to be charged, no sum shall be deducted in respect of— " (*a*) any disbursements or expenses, not being money wholly " and exclusively laid out or expended for the purposes of the " trade, profession, employment or vocation." Excess profits tax is dealt with in s. 14, sub-s. 1, of the Finance (No. 2) Act, 1939, which enacts that for the purpose of that tax the profits arising from a trade or business should be computed on income tax principles as adapted in accordance with the provisions of Part I. of sch. VII. to the Act and defines income tax principles in relation to a trade or business as "the "principles on which the profits arising from the trade or "business are computed for the purposes of income tax under "Case I. of sch. D., or would be so computed if income tax "were chargeable under that Case in respect of the profits "so arising." The only other provision of the Act which need be quoted is that contained in s. 18, sub-s. 1, viz.: "The "amount of the excess profits tax payable in respect of a trade "or business for any chargeable accounting period shall, in "computing for the purposes of income tax the profits and "gains arising from that trade or business, be allowed to be "deducted as an expense incurred in that period."

The appellants relied upon this last section coupled with the fact that excess profits tax is imposed on traders only and urged that the expense of ascertaining the sum properly deductible as excess profits tax from income tax was an expense wholly and exclusively laid out for the purposes of the trade. A subsidiary question arises as to whether the expenditure incurred, in order to ascertain the sum properly allowable, was undertaken to save tax or for the purposes of retaining the services of Mr. Young, but, from the facts already stated, it is plain that the main question in the case is concerned with the true meaning of the expression "wholly "and exclusively laid out for the purposes of the trade" and more particularly with the phrase "purposes of the trade."

The phraseology and its meaning have been dealt with in a considerable number of cases, but before considering their effect I think it desirable to state the conclusion at which I should have arrived from a study of the wording of the section itself. The widest meaning attributed to it, and that for which the appellants contend is perhaps best expressed by saying that it includes every expense to which the trader is put because he carries on the trade. Were he not a trader, it is contended, he would not have to pay excess profits tax and therefore any expense to which he is put in arriving at its correct figure is wholly and exclusively laid out for the purposes of the trade. Similarly it is maintained that as the law obliges him to pay income tax, his expenses of calculating the balance of profits and gains for income tax purposes are incurred wholly and exclusively for the purpose of his trade, more particularly where the taxpayer is a company which by law is compelled to publish its accounts. In support of this argument it is urged that even the amount available to be put aside as reserve or for distribution in dividends cannot be ascertained until it is known what sum must be provided for excess profits and income tax purposes. The argument, so far, extends only to expenditure incurred for the purpose of finding out what the balance of profits or gains is, but it is said, if the cost of ascertaining that balance by making up the company's accounts is wholly and exclusively laid out for the purposes of the trade, so the expense of ensuring by an appeal to the Board of Referees the correctness of the figure reached is equally wholly and exclusively laid out for that purpose. The opposite view, maintained by the Crown, is perhaps best expressed in the case of *Strong & Co. of Romsey, Ld.* v. *Woodifield* (1) where Lord Davey says: " These words " . . . . appear to me to mean for the purpose of enabling " a person to carry on and earn profits in the trade." My Lords, that expression has often been referred to and approved, but it was used in reference to the circumstances of the case then under consideration and I doubt if it carries the matter to a final conclusion. It still leaves open the question what expense is incurred for the purpose of enabling a trader to earn profits and the adoption of a phrase helpful in analysing the meaning of words in an Act of Parliament with reference to a particular set of circumstances is not necessarily either useful or conclusive in all cases. It is probably safer to retain the wording of the Act itself and, by applying it to the facts established, to discover whether the deduction falls within its terms or not. Regarding the circumstances which your Lordships have to consider from this point of view, I should myself draw a marked distinction between accounts made up on the purely trading basis and those which are prepared for and accepted by the Inland Revenue. If there were no obligation to ascertain and pay either of these taxes, there would be no necessity for making up accounts on income tax principles—it would suffice to make up the ordinary commercial accounts. The computation of accounts for tax purposes is therefore not directly associated with the carrying on of the business. It is an obligation imposed upon the company for another and extraneous purpose, i.e., for the purpose of ascertaining the tax to be paid out of profits. It is not, at any rate directly, undertaken for trade purposes but to satisfy the revenue authorities. It is true that as a matter

(1) [1906] A. C. 448, 453.

of convenience the cost of making up accounts for the inland revenue is allowed by the authorities as a deduction from profits, as is the cost of making up the strictly business accounts of the trade, but this is not a matter of principle but of expediency. The two duties overlap and in practice are almost indivisible. Moreover it is of advantage to the Revenue to have the figures required for their purposes carefully and accurately made up. Strictly, however, I think the expenses should be divided and any additional cost of making up revenue accounts should be disallowed in determining the allowable deduction for income tax purposes, but the advantages of allowing both to be deducted as a practical measure outweigh the disadvantages, though the result may not be strictly logical. But no such illogicality has to be faced when the sum which is alleged to be deductible is not the cost of accountants' work in ascertaining trading profits, but the expense of an appeal to the Board of Referees for the purpose of discovering the true measure of profits for tax purposes only. Such expenditure is incurred directly for tax purposes and for nothing else, though it may indirectly affect both the amount available for distribution to the proprietors of the business and that proper to be put to reserve. This is the conclusion which I should have reached if left to determine the question unassisted and unembarrassed by authority. It remains to be determined whether your Lordships' decisions in previous cases throw doubt upon this view.

My Lords, the case of *Strong & Co. of Romsey, Ld.* v. *Woodifield* (1) may be said to form the starting point for deducing the principles at stake in the present appeal and, though the words of Lord Davey quoted above are the expression most frequently referred to, I think that those of Lord Loreburn L.C., have equal, if not greater importance. He says (2) : " It does not follow that if a loss is in any sense " connected with the trade, it must always be allowed as a " deduction ; for it may be only remotely connected with the " trade, or it may be connected with something else quite as " much as or even more than with the trade. I think only " such losses can be deducted as are connected with, in the " sense that they are really incidental to, the trade itself. " They cannot be deducted if they are mainly incidental to " some other vocation or fall on the trader in some character " other than that of trader." Further, Lord Davey, after pointing out that Case I. relates to trades, manufactures, adventures or concerns in the nature of trade, goes on to say (1): "It is not enough that the disbursement is made "in the course of, or arises out of, or is connected with, the "trade, or is made out of the profits of the trade. It must "be made for the purpose of earning the profits." These expressions of opinion given some forty years ago and accepted ever since are, in my view, inconsistent with the appellants' contention, but it is said they are at best dicta and are inconsistent with the principles upon which such authorities as *Smith* v. *Lion Brewery Co., Ld.* (2) and *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (3) are based, and in particular with the observations of Viscount Cave L.C., in *British Insulated and Helsby Cables, Ld.* v. *Atherton* (4), who says that it has often been pointed out that the Act does not contain any express allowance or enumeration of deductions and therefore it is necessary first to inquire whether the deduction is expressly prohibited and if not whether it is of such a nature as to be proper to be charged against incomings in a computation of the balance of profits and gains. He goes on to state (5) that "a sum of money expended, not of necessity and with a view "to a direct and immediate benefit to the trade, but voluntarily "and on the grounds of commercial expediency, and in order "indirectly to facilitate the carrying on of the business, may "yet be expended wholly and exclusively for the purposes of "the trade." My Lords, this statement was obiter only, as the actual decision was merely that the expenditure was capital expenditure and therefore not deductible, but the language does require careful consideration. In that case the question actually in issue was whether subscriptions by a company towards a pension fund were to be deducted in ascertaining the balance of profits and gains of its trade, and it is true that the expenditure did not at once affect its revenue, but it was a method of ensuring the better and more contented service of its employees and in that sense it did directly affect the success of its enterprise. It was exclusively laid out to enable the company to be more successful: no part of it was incurred in order to ascertain the Revenue's proportion of the profits when made. So far as income tax is concerned, there is direct authority in the High Court in *Allen* v. *Farquharson Brothers & Co.* (6) that the cost of opposing the

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(1) [1906] A. C. 448.

(2) Ibid. 452.

(1) [1906] A. C. 448, 453.
(2) [1911] A. C. 150.
(3) [1915] A. C. 433.
(4) [1926] A. C. 205, 211.
(5) Ibid. 212.
(6) 17 Tax Cas. 59.

Inland Revenue in a contest as to what the profits of a business are is not deductible. But it is said, that case merely followed *Strong & Co. of Romsey, Ld.* v. *Woodifield* (1), and in any case excess profits tax differs inasmuch as it is imposed on a trader only and therefore the cost of ascertaining it is part of the trade. I do not accept this contention. It is true that a trader only is liable to pay it, but it is not payable by him as a trader. He pays as an individual, like any other individual, tax on the sum which he has earned as a trader. " To my mind," said Lord Selborne L.C. in *Mersey Docks & Harbour Board* v. *Lucas* (2), " it is reasonably plain that the " gains of a trade are that which is gained by the trading, for " whatever purposes it is used " and therefore what your Lordships have to determine is whether the expense is incurred in order to earn gain or is the application or distribution of that gain when earned. With all respect to the opposing view, expenditure to ascertain the true amount of tax to be paid, whether it be income tax or excess profits tax and whether successful or unsuccessful, is in my opinion incurred, at any rate in part, in order to determine the correct amount of income tax or excess profits tax as the case may be and not in order to earn gain, even though that phrase be given a broad significance. The same conclusion might be reached by saying in the words of this statute that such expense is not wholly or exclusively laid out for the purposes of trade. It is in truth partially, if not wholly, laid out in order to discover what sum is to be paid to the Crown out of the profits or gains, which have already been earned and computed.

In these two consolidated appeals the further point was argued that those appeals were launched and consequent expense incurred in order that Mr. Young's services might be retained. The Special Commissioners, however, have found that one main object, though possibly not the most prominent, was to save tax. They had evidence on which they could so find and in these circumstances, this is not a matter in which your Lordships would interfere.

I would dismiss both appeals.

LORD SIMONDS (read by LORD NORMAND). My Lords, these consolidated appeals, the one by Smith's Potato Estates, Ld., which I will call " the estates company " and the other by Smith's Potato Crisps (1929), Ld., which I will call " the

(1) [1906] A. C. 448.

(2) 8 App. Cas. 901, 905.

"parent company," since the estates company is its subsidiary, raise questions of income tax and excess profits tax upon which Atkinson J. and the Court of Appeal have come to different conclusions. In the income tax appeal the question is whether certain expenses amounting to 622*l.* 10*s.* 11*d.* incurred by the estates company in promoting an appeal to the Board of Referees under a statutory provision in respect of liability to excess profits tax ought to be deducted in computing the profits of the business of the company for purposes of income tax under Case I. of sch. D. of the Income Tax Act, 1918. In the excess profits tax appeal the question is whether the same expenses ought to be deducted in computing the profits of that business for the purposes of excess profits tax under Part III. of the Finance (No. 2) Act, 1939, and enactments amending that Part. The parent company are appellants in the excess profits tax appeal because they are chargeable to that tax in respect of the profits of the business of the subsidiary company. The appeal to the Board of Referees, the expenses of which have given rise to these questions, was an appeal by the estates company against the disallowance by the Commissioners of Inland Revenue under s. 32 of the Finance Act, 1940, of the deduction of certain fees and payments for services to a manager of the business of the estates company in computing the profits of its trade or business for the purposes of excess profits tax. The appeal was allowed by the Board of Referees. It is not disputed that the expenses were reasonable and properly incurred.

It is necessary to refer to only a few statutory provisions. It is provided by s. 14, sub-s. 1, of the Finance (No. 2) Act, 1939, that for the purposes of excess profits tax the profits arising from a trade or business shall be computed on income tax principles, subject to certain adaptations which are not relevant to the present case, and it is further provided that for the purposes of the sub-section the expression "income tax "principles" in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purposes of income tax under Case I. of sch. D. or would be so computed if income tax were chargeable under that Case in respect of the profits so arising. Section 18, sub-s. 1, of the same Act provides that the amount of the excess profits tax payable in respect of a trade or business for any chargeable accounting period shall, in computing for the purposes of income tax the profits and gains arising from that trade or business, be allowed to be deducted as an expense incurred in that period. As will appear, the estates company relied upon this section in the income tax appeal. The first section that I cited refers me back to Case I. of sch. D., under which income tax is imposed upon the profits of any trade, manufacture, adventure or concern in the nature of a trade and the profits are directed to be computed in accordance with the rules applicable to the sources comprised in that Case. By r. 3 (*a*) of the Rules applicable to Cases I. and II. it is provided as follows: "In computing the "amount of the profits or gains to be charged, no sum shall "be deducted in respect of (*a*) any disbursements or expenses, "not being money wholly and exclusively laid out or expended "for the purposes of the trade, profession, employment or "vocation."

These are the words round which the main argument has ranged. It has been contended as a general proposition that the expenses of disputing an assessment to income tax and litigating it to the utmost permissible extent are deductible for the purpose of computing the amount of profits of the trade to be charged. But a subsidiary argument also was developed upon the facts of the particular case on which I must say a few explanatory words. The manager of the estates company, whose remuneration had been the subject of the disallowance by the Commissioners of Inland Revenue and of the appeal to the Board of Referees, was a Mr. Young. His services were regarded as of great importance by the estates company, who feared that they might be lost, if in the year under review and in future years any part of his remuneration should be disallowed. It was therefore contended that there was in the exceptional circumstances of the case a special business motive for incurring the expenses of an appeal, a matter which went to the earning of future, as distinct from the taxation of past, profits.

Both on the general and the subsidiary contentions the Special Commissioners were against the appellants. As I read their decision they accepted that there was the "special "business motive" that I have stated but added these words: "Nevertheless, the immediate purpose of the appeal "was that of all taxation appeals, namely to get a reduction "of tax, or, in other words, to retain a larger share of the "profits. We regard this as a substantive purpose in itself, "and not as something merely incidental to the earning of "future profits." They, therefore, held that the expenses in question were not money "wholly and exclusively" laid out or expended for the purposes of the trade within r. 3 (*a*) of Cases I. and II. They added that they were not a "loss" within r. 3 (*e*), but that is not a matter which has now to be considered. Atkinson J. took a different view. He thought that an expense properly and reasonably incurred in the final ascertainment of profits could be considered an outlay in order to earn profits. And, apart from this general ground, he thought that in the particular circumstances of the case the expenses might be deducted upon the footing that expenditure for the purpose of retaining somebody really vital to the business was expenditure, which was "even on a narrow inter"pretation of the phrase incurred for the purpose of gaining "profits." The Court of Appeal unanimously reversed the judgment of Atkinson J. on both points, and in spite of the able and cogent arguments of counsel for the appellants I cannot entertain any doubt that the decision of the Court of Appeal is right.

My Lords, I suppose that few expressions have been discussed more often in the court than that which you have once again to consider, "money wholly and exclusively laid "out or expended for the purposes of the trade." But it is their application rather than their meaning that is in doubt. I agree with the submission of learned counsel that it does not help to substitute other words for those which are found in the statute and then to put a gloss upon those other words. But it is, I think, important to emphasize that the words "for the purposes of the trade" in their context, i.e., where a computation of "profits" for the ascertainment of taxable income is being made, must mean "for the purpose of enabling "a person to carry on and earn profits in the trade." These familiar words I cite from Lord Davey's speech in *Strong & Co. of Romsey, Ld.* v. *Woodifield* (1). They have been cited and applied over and over again, and, if they are kept firmly in mind, they dispose in limine of the argument which prevailed with Atkinson J. and has been urged before your Lordships. A consideration of the numerous cases that were cited shows that it is not always easy to decide whether it can be said of a particular expenditure that it satisfies Lord Davey's test. But it is significant that counsel were not able to call to the

(1) [1906] A. C. 448, 453.

attention of the House any case in which the appellants' present contention had been put forward. For a long period of years large sums of money have been devoted to the litigation of income tax claims: the most acute minds of the legal and accountancy professions have been at the service of the taxpayer: yet the claim that such money was expended wholly or exclusively for the purpose of the trade appears never to have reached a court of law. The reason is not far to seek: it is that neither the cost of ascertaining taxable profit nor the cost of disputing it with the Revenue authorities is money spent to enable the trader to earn profit in his trade. What profit he has earned, he has earned before ever the voice of the tax gatherer is heard. He would have earned no more and no less if there was no such thing as income tax. His profit is no more affected by the exigibility of tax than is a man's temperature altered by the purchase of a thermometer, even though he starts by haggling about the price of it. It is in this sense that Lord Green M.R. in *Rushden Heel Co., Ld.* v. *Inland Revenue Commissioners* (1) used a phrase which was challenged by counsel for the appellants. "But his obligation," he said, "to pay it [the tax] is his "obligation as a subject and a taxpayer, and in ascertaining "the amount of his liability he is putting himself in a position "to discharge his duty to the Crown." As a trader it is his job to make profits: as a taxpayer it is his duty like that of any other subject to pay taxes. It is as little a part of his trade to find out how much tax he must pay as it is a part to pay it when he has found out. In this respect he is in the same position as any other taxpayer under any other case of any other schedule. This aspect of the case may be examined more closely. Let me suppose that a trader, having been assessed to income tax in the sum of X*l.* in a certain year, disputes the assessment, claiming that his taxable profit is not X*l.* but a lesser sum, say Y*l.* Suppose further that he succeeded in his claim. I fail to see how he has by the expenditure that he incurred earned profit in his trade. His taxable profit has been reduced: that was the object of his expenditure. But what has this to do with his trading profit? If his trading profit is to be regarded as the same thing as his taxable profit (which it is not or is not necessarily), then his money has been laid out for the purpose of reducing his trading profit, a purpose difficult to ascribe to a trader and

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(1) [1947] 1 All E. R. 699, 702; 26 A. T. C. 116, 117.

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impossible to bring within the scope of the Rule. To use an expression of Rowlatt J. in *Union Cold Storage Co., Ld.* v. *Jones* (1), unless the expenditure is at least intended to " bring " grist to the mill " of the trader, it cannot within the meaning of the rule be money paid out for the purpose of his trade.

Two cases only need specific mention. Upon both I respectfully concur in everything that has been said by the Master of the Rolls in *Rushden Heel Co., Ld.* v. *Inland Revenue Commissioners* (2). In *Allen* v. *Farquharson Brothers & Co.* (3), certain observations of Finlay J. were relied on by the appellants. I would question whether that learned judge intended to say anything that would support their contention. I do not doubt that, as a practical matter, the revenue authorities allow accountancy charges as a deduction in computing profits, both because such charges are necessary for trading as well as tax purposes and it would be vexatious to distinguish between them, and because they must find their own task an easier one if they are dealing with professional men who speak their language and understand their art. I do not think it necessary to decide how far in this direction the revenue authorities are bound to go. But, if Finlay J. meant that an expense incurred solely for the purpose of dispute with the Crown could be deducted, then I must join with the Master of the Rolls in expressing my respectful dissent. In *Worsley Brewery Co., Ld.* v. *Inland Revenue Commissioners* (4), certain observations of Romer L.J. have, as I think, been misunderstood and relied on. I need say no more than that I wholly agree with the explanation given by the Master of the Rolls and Morton L.J. of this case.

It remains to consider the special reason advanced in this case for allowing the deduction of expenditure incurred in contesting a tax claim. Here again I am so fully in agreement with the learned Master of the Rolls that I need say little. If the expense of contesting a tax claim is not per se a deductible expense, I cannot accept the proposition that some special ulterior motive makes it deductible. I see that money has been laid out for the purpose of contesting a tax claim. I know, for I assume that to have now been decided, that money so laid out is not laid out wholly and exclusively for the purposes of trade. I do not understand by what process of reasoning the contrary result is reached and it is found to be wholly and exclusively laid out for the purposes of trade, because there was an ulterior motive. This is to confuse motive with purpose.

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(1) 129 L. T. 512, 516; 8 Tax Cas. 725, 736.

(2) [1947] 1 All E. R. 699, 702; 26 A. T. C. 116, 117.

(3) 17 Tax Cas. 59.

(4) 17 Tax Cas. 349.

Finally, upon the income tax appeal it was urged that, since under s. 18, sub-s. 1, of the Finance (No. 2) Act, 1939, the excess profits tax that has been paid may for income tax purposes be deducted as an expense, so also should the cost of ascertaining the amount of the excess profits tax be deductible. I have felt a good deal of sympathy for this argument but have come to the conclusion that its attractiveness lies rather in its suggestion of what the legislature might, subject to proper limits, have reasonably done than in its correct interpretation of the section. It is clear that but for the section the excess profits tax itself could not be deducted. Making express provision for that deduction, it is silent about the cost of ascertainment. I do not feel at liberty as a matter of construction to say that by implication the one is included in the other.

I would dismiss both these appeals.

LORD NORMAND. My Lords, the questions in these appeals are whether the costs and expenses of a successful excess profits tax appeal are a proper deduction in computing profits and gains either for the purposes of income tax or for the purposes of excess profits tax. But these questions can in effect be reduced to the single question whether the costs and expenses are deductible in computing the profits for the purposes of income tax, and it can also be said that it would have made no difference if the costs had been incurred in prosecuting an income tax appeal. Profits for excess profits tax purposes are computed on income tax principles, and, though excess profits tax is under s. 18 of the Finance (No. 2) Act, 1939, allowed to be deducted in computing profits for the purposes of income tax, this express allowance, which does not extend to the costs and expenses of appeals, is in my opinion directed to limiting the total taxation of trade profits and distributing it between the two taxes in accordance with the intention of Parliament. Apart from the provisions of s. 18 of the Finance (No. 2) Act of 1939, excess profits tax would not be deductible any more than income tax itself is deductible in computing profits for income tax purposes. The reason why income tax is not deductible in computing profits for income tax purposes is not merely the logical difficulty pointed out by Mr. Grant that, if it were, the computation would inevitably drift through the repetition of the deduction into the eddy of an indefinite process. There is the more substantial reason, that income tax is an impost made upon profits after they have been earned, and that unless the observations of Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield* (1), which have often been referred to and applied in later cases, are to be disregarded a payment out of profits after they have been earned is not within the purposes of the trade carried on by the taxpayer. But excess profits tax also is levied on profits after they are earned and, apart from the statutory provision, is in pari casu with income tax. The issue is accordingly whether the costs and expenses of an income tax or an excess profits tax appeal would properly be entered on the debit side of an account of disbursements and receipts framed for the purpose of arriving at the full amount of the profits and gains of a company's trade under Case I. of sch. D., or whether r. 3 (*a*) of the Rules applicable to Cases I. and II. of sch. D. prohibits their deduction as not being money wholly and exclusively laid out or expended for the purposes of the company's trade.

Every trading company must keep books of account and these books are used by the accountants for the purpose of making up the commercial profit and loss account. The accountants may use that account by applying to it the modifications which income tax law requires in order to bring out the profit for income tax purposes, and they may have to negotiate with Inland Revenue officials in order to justify their account of profits and perhaps to obtain a correction of an assessment. It will also be necessary to prepare an account showing the amount of the distributable profits after making provision for the income tax liability. As the first and the last of these accounts are among the purposes of the trade, the taxpayer may say that the whole accounting process, including even the prosecution of an appeal in order to determine the correct income tax assessment, is carried out for the purposes of the trade, and it may be added that the proper conduct of the trade requires that the assessment shall be correct. On the other hand, it may be said that there is in strictness no part of the accounting process which is not

(1) [1906] A. C. 448, 453.

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directly or indirectly concerned with income tax liability and that, as the payment of income tax is not a purpose of the trade, none of the costs incident to the accounting process are laid out exclusively for the purposes of the trade. That would be an extreme and, I think, an untenable proposition. The Inland Revenue's contention in these appeals did not go nearly so far. It was that the costs and expenses of appeal proceedings before the Commissioners of Inland Revenue or the Board of Referees and from them to the courts are not laid out exclusively for the purposes of the trade and are therefore not permissible deductions. The line drawn by the Inland Revenue would allow deduction of the costs incurred in negotiations with their officers before an appeal is taken or where no appeal is taken, either as a concession to the taxpayer or as a practical and convenient settlement of a disputable point. The costs of an appeal against an assessment are incurred at least in part, if not exclusively, for the purpose of reducing the payment which the taxpayer will have to make if he acquiesces in the assessment. The purpose of the appeal is not limited to correcting the assessment itself, for if the assessment involved no liability to pay no one would go to the trouble and expense of appealing against it. So, even if the correction of the assessment is within the purposes of the trade, the expenses and costs of the appeal are nevertheless laid out at least partly for a purpose which is not one of the purposes of the trade ; they are accessory to the payment of a tax out of profits and are non-deductible because the tax itself is non-deductible. As I understand the judgment of Lord Greene M.R. in *Rushden Heel Co. Ld.* v. *Inland Revenue Commissioners* (1), that is the ground on which he has decided the general question against the appellants. I refer specifically to the following passage, which I would respectfully adopt : " I am prepared to assume (although I do not so decide) that " the ascertainment of the proper amount of tax payable " ought, as the appellant argues, to be regarded as necessary " for the proper carrying on of the trade, and, therefore, for " the earning of profits in the future. But I cannot agree that " the money can be said to have been laid out ' wholly and " ' exclusively ' for that purpose. It was laid out, as it appears " to me, just as much, if not more, for the purpose of ensuring " that the company, like any other taxpayer, should pay the " proper amount of tax, no more and no less." I agree also

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(1) [1947] 1 All E. R. 699, 702 ; 26 A. T. C. 116, 117, 118.

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with the further observation that an accountancy expense incurred solely for the purpose of conducting a tax controversy with the Crown cannot be deducted.

In these appeals a subsidiary or alternative argument was presented, that the real purpose of the excess profits tax appeal was to retain the services of a valuable employee. But the findings of fact do not go so far as this; they mean only that the directors had that in view as one of the objects of the appeal. Even if it was a principal object it would nevertheless not exclude the payment of the correct amount of tax as another important purpose of the appeal.

I would refuse the appeals.

LORD OAKSEY. My Lords, the question in this appeal is whether the costs of litigation undertaken for the purpose of arriving at the true profits of a trade for the purposes of taxation are proper deductions in order to arrive at the balance of profits and gains or as expenses wholly and exclusively laid out or expended for the purposes of the trade within the meaning of r. 3 (*a*) of the Rules Applicable to Cases I. and II. of sch. D. of the Income Tax Act, 1918. The contention on behalf of the Crown is that no expenses connected with taxation are deductible, because it is said they are not expended for the purposes of the trade and it to sought to limit the words "the purposes of the trade" to the purpose of earning the profits of the trade by the operations of the trade. Reliance is placed upon the dictum of Lord Davey in *Strong & Co. of Romsey, Ld.* v. *Woodifield* (1), which has frequently been cited with approval in other cases, but it is to be observed that Lord Davey did not say "earning "the profits by the operations of the trade" and in my opinion the words "the purposes of the trade" ought not to be construed in this way. A trader does not expend money in an action brought for or against him for negligence or breach of contract in the course of his trade for the purpose of earning the profits of the trade in this sense, for it is not an operation of his trade to engage in litigation. It is, of course, an incident which he may think reasonably necessary for the purposes of his trade to bring or defend actions. But so it is an incident which he may think reasonably necessary for the purposes of his trade to engage in litigation as to the amount of his taxes. If he succeeds in either case he increases the profits arising

(1) [1906] A. C. 448, 453.

from his trade and it appears to me to be no straining of language to say that a trader who increases his profits by incurring a certain expense incurs that expense for the purposes of his trade.

In my opinion, the real question which has to be decided in every case is whether the expense is one which is incurred in order to earn gain or profit from the trade or is the application of the gain or profit when earned (see per Lord Selborne L.C. in *Mersey Docks & Harbour Board* v. *Lucas* (1)), and, in my opinion, it cannot be truly said that the expense of paying accountants or of litigating the question of what is the balance of profits and gains for the purposes of taxation is the application of these profits. Profits cannot properly be applied or divided until they are ascertained and every expense which is properly incurred for the ascertainment of profits is, in my opinion, an expense of earning the profits and not an application of them. That is not to say that all expenses which are incurred in point of time before the profits are ascertained can be deducted. The point of time is unimportant: some expenses which are clearly the application or distribution of profits may be incurred before the ascertainment of profits, e.g., capital investments or payment of interim dividends. But it is the character of the expense which must be considered. The expense in this case was not a capital investment : it was incurred not to distribute but to increase and in that sense to earn the profits. On the other hand, if it is to be held that such expenses are not deductible what is to be said of the costs of audit which the Companies Acts make necessary or of that part of the cost of bookkeeping which is used in the preparation of such an audit or of accounts for taxation ? They are not incurred for the purpose of earning the profits of the trade in the limited sense contended for by the Crown. It is said that the expense of litigating questions of taxation has never been sought to be deducted and it may be so, but it is also true that the expense of paying accountants and auditors has been deducted, and in any event the fact, if it be the fact, throws no legal light upon the construction of the words in question. For these reasons I am in favour of allowing the appeals.

Appeals dismissed.

Solicitors for appellants : *Warren, Murton & Co.*
Solicitor for respondent : *Solicitor of Inland Revenue.*

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(1) 8 App. Cas. 891, 906.

H. L. (E.)*

1948

June 28, 29; *July* 29.

[HOUSE OF LORDS.]

SHORT AND ANOTHER . . . APPELLANTS;

AND

TREASURY COMMISSIONERS . . RESPONDENTS.

Emergency legislation—Company—Acquisition of control by competent authority—Compensation to shareholders—Valuation of shares—Defence (General) Regulations, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 78 (5).

Under reg. 78 (5.) of the Defence (General) Regulations, 1939, where, by virtue of an order made under reg. 78 (1.) (*b*) shares in a company were transferred to nominees of a competent authority, "the price to be paid by a competent authority in respect of any "shares transferred . . . . shall be . . . . a price which, in the "opinion of the Treasury, is not less than the value of those "shares as between a willing buyer and a willing seller."

Held that the words "any shares" in reg. 78 (5.) referred to those embraced in an individual parcel and it was those shares, not the shares of the company as a whole, the value of which was to be ascertained as between a willing buyer and a willing seller.

Decision of the Court of Appeal [1948] 1 K. B. 116 affirmed.

APPEAL from the Court of Appeal (Tucker, Somervell and Evershed L.JJ.).

The issued capital of Short Brothers (Rochester and Bedford), Ld. (hereinafter called "Short Brothers"), consisted of three classes of shares, viz., 230,475 redeemable preference shares of 1*l*. each (as to which no question arose in this appeal), 250,000 "A" ordinary shares of 5*s*. each and 581,302 ordinary shares also of 5*s*. each. The voting power was concentrated in the ordinary shares and each "A" ordinary share entitled its holder to four votes as against one vote in the case of each ordinary share. No distinction was claimed to exist between the two types of share for the purposes of this case. The facts giving rise to the appeal were stated in paras. 3 to 8 of the printed case of the respondents, the Treasury Commissioners, as follows: "3. (1.) By para. 4 of reg. 55 of the Defence "(General) Regulations, 1939, a competent authority was "empowered for (inter alia) the efficient prosecution of the war "to appoint by order an authorized controller of any under-

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* *Present:* LORD PORTER, LORD UTHWATT, LORD DU PARCQ, LORD NORMAND and LORD MORTON OF HENRYTON.

" taking to exercise with respect to the undertaking such " functions of control on behalf of His Majesty as might be " provided by the order. (2.) By para. 1 of reg. 78 of the said " regulations where an order appointing an authorized controller " had been made in the case of an undertaking carried on by a " company, the competent authority, if satisfied that it was " necessary for the purpose of securing effective control, was " empowered with the consent of the Treasury by order to " transfer the shares of the company to such transferees as " might be specified in the order. (3.) By para. 4 of reg. 78 " it was provided that where an order had been made under " para. 1 thereof the shares should on such date as might be " specified in the order vest in the transferees on behalf of the " competent authority free from any mortgage, pledge or " charge. (4.) By para. 5 of reg. 78 the price to be paid in " respect of any shares transferred by virtue of such an order " was to be such price as might be specified in an order made " by the Treasury, being a price which, in the opinion of the " Treasury, was not less than the value of those shares as " between a willing buyer and a willing seller on the date of the " order made appointing the authorized controller. (5.) By " para. 7 of reg. 78 if any person, who immediately before the " date of transfer had an interest in any of the shares, claimed " that the price specified by the Treasury was less than the " value aforesaid the value of the shares in which that person " had an interest should be determined by the arbitration of a " qualified accountant nominated by the Lord Chief Justice " of England. 4. By an order entitled Short Brothers " (Rochester and Bedford) Limited Control Order, 1943, dated " March 17, 1943, the Minister of Aircraft Production in exercise " of his powers under para. 4 of reg. 55 appointed an authorized " controller of the undertaking of the company. 5. By an " order entitled Short Brothers (Rochester and Bedford) " Limited (Transfer of Shares) Order, 1943, dated March 22, " 1943 (hereinafter referred to as the 'Transfer Order'), " the said Minister with the consent of the Treasury transferred " as at March 23, 1943, all the shares in the company to his " nominees . . . . 6. By an order entitled Short Brothers " (Rochester and Bedford) Limited (Price of Shares) Order, " 1943, dated May 31, 1943, (hereinafter referred to as the " 'Prices Order'), the respondents specified the following " prices: (*a*) 22*s*. 3*d*. per share in the case of the 5 per cent. " Redeemable Cumulative Preference Shares; (*b*) 29*s*. 3*d*. per "share in the case of the 'A' ordinary shares; (c) 29*s.* 3*d.* "per share in the case of the ordinary shares. 7. The appellant Francisco Samuel Short was at all material times the "holder of 22,958 'A' ordinary shares in the company and the "appellants Lonsdale Investment Trust, Ld. were at all "material times the holders of 3,000 ordinary shares in the "company. Both appellants gave notice that they were "dissatisfied with the prices fixed for their shares by the Prices "Order and Mr. Sydney John Pears, a qualified accountant, "was nominated by the Lord Chief Justice of England to act as "arbitrator and to assess the value of the said 'A' ordinary "and ordinary shares. For convenience it was agreed that the "claims of the appellants should be treated as test cases and "that if the arbitrator held that the prices to be paid by the "Treasury to the appellants should be in excess of those "specified in the Order the Treasury would pay those "revised prices in respect of all shares of these classes, "irrespective of whether other former holders had themselves "claimed arbitration. 8. The arbitration was held on "October 16, 17 and 18, 1946, and on October 30, 1946, the "arbitrator stated his award in the form of a special case for "the opinion of the court." In para. 10 of the award it was stated that "in the course of the evidence it appeared that "29*s.* 3*d.* per share, which was the price mentioned in the "said Order of May 31, 1943, was simply fixed by reference to "the prices of such shares ruling on the Stock Exchange on "the date of transfer of the shares, namely, March 23, 1943." (Admittedly the date referred to was to be treated as a clerical error for the Control Order, viz., March 17, 1943.) In para. 11 it was stated that the respondents "contended that the proper "basis of valuation under reg. 78 . . . . was to assume that "the Minister had acquired all the shares in individual blocks "from individual shareholders on the date of transfer, and "on this assumption to fix the value of all the shares on the "basis of the prices ruling on the Stock Exchange on such date." (Here too the date should be that of the Control Order.) By para. 12 it was stated that the appellants "contended "that the transfer effected . . . . being a transfer of all the "shares . . . . the appropriate mode of fixing the price would "be first to ascertain the value of the whole undertaking and "then to determine the proportionate value of the separate "classes of shares and of individual shares within each class." By para. 14 the arbitrator awarded that if the court was of opinion that the contention of the appellants was correct, the respondents should pay 41*s*. 9*d*. in respect of each share. By para. 15 he awarded that if the court was of opinion that the contention of the respondents were correct, they should pay 29*s*. 3*d*. in respect of each share. By para. 17 he awarded that if either party failed to set down the award for argument before the court, the respondents should pay 41*s*. 9*d*. in respect of each share. The award having been set down for hearing Morris J. held that the respondents' contention was correct. The Court of Appeal having affirmed this decision, the appellants appealed to the House of Lords.

Sir David Maxwell Fyfe K.C., *Cecil Turner* and *Winterbotham* for the appellants. The fundamental fallacy of the respondents is that their method of valuation would put artificial blinkers on the willing vendor. One must treat the compulsory purchaser as a willing purchaser prepared to pay for what he is receiving. In the present case one must take it that the respondents are prepared to pay for what they want, viz., complete control of the company through the purchase of the shares. Accordingly, one cannot reach the value of those shares without finding the value of the undertaking as a whole, which should be reflected in the price paid to the shareholders, who are part owners of that undertaking. When the value of the business as a going concern is ascertained, the global sum should be divided in due proportions between the different classes of shareholder. What reg. 78 directs is the acquisition of the whole of the share capital with the design of giving the purchaser complete control of the undertaking and, since this is equivalent to acquiring the ownership of the undertaking, there is, in effect, a direction that the purchaser shall pay for that. Thus the appellants are not importing anything into the regulation. The two steps required respectively by reg. 78 (1.) (*a*) and (*b*), provide the basis of the scheme: (i.) The competent authority must be satisfied that it is necessary to secure effective control of the undertaking; (ii.) It must be satisfied that the expedient method of securing that control is that all the shares in the undertaking should be held on behalf of that authority. The necessity arose out of the fact that an authorized controller appointed under reg. 55 (4.) would have been acting ultra vires if he had directed the company to undertake a new liability and could not alter the whole nature of the undertaking or the fundamental method of carrying it on; but unless the Minister could say, in any case, that complete control was necessary, the courts would declare any transfer order void. Since, in these circumstances, the regulations provided that all the shares were to be transferred to the nominees of the competent authority, it would require express words, which are not present, to relieve the respondents of the liability to acquire them as a totality. This is supported by the practical consideration that, apart from the regulations, it would be impossible for anyone to acquire all the shares in question save on the basis of paying for the undertaking as a whole. It is against this background that reg. 78 (5.), which sets out the financial consequences of the Minister taking action under reg. 78 (1.) must be construed. All the shares, taken in a single block, are worth the value of the undertaking and, therefore, each must have a price allotted to it on the basis of that value. Here the competent authority starts by declaring that it will require all the shares. The words "any shares" and "those shares" in reg. 78 (5.), expressions which it is hard to distinguish from each other, are exhaustive of the price to be paid by the respondents in the transaction and one should not retire from the conception of all the shares being transferred, changing to the conception of dealing with individual parcels of shares. It is quite artificial to distinguish between the acquisition of all the shares and the acquisition of the whole undertaking: see Lord Wrenbury in *Bradbury* v. *English Sewing Cotton Co., Ld.* (1). Since the whole undertaking is being acquired it should be paid for. It is a new conception that the Government should be allowed to acquire an undertaking at two-thirds only of its value; the old conception was that it should pay for what it took over. This is a confiscatory regulation and should be construed in favour of the shareholders rather than the Crown. A construction which enabled the Crown to acquire the whole share capital at a total price considerably less than the value of the undertaking should not be adopted unless the language is so clear that no other construction is possible. The Stock Exchange value, in such a case as this, is no guide, for it would, in any case, be impossible to purchase all the shares in a company at the price ruling on the Stock Exchange on a given date. If one were dealing with a great number of shares they would be dealt with by an issuing house on the basis of the value of the undertaking. Further, it is an essential condition of an

(1) [1923] A. C. 744, 767.

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exercise of the powers conferred by reg. 78 that every single share of the company should be acquired and every shareholder is therefore necessarily aware that the acquisition of his holding is as essential to the purchaser as that of any other holding. The competent authority, as a possible purchaser, is clothed with the powers and limitations of reg. 78. This fact must necessarily be taken into account in considering at what price the vendor is to be deemed to be willing to sell his shares. No shareholder would be a willing seller, knowing that the purchaser was also acquiring all the other shares in the company, unless the total price paid for all the shares was fair, having regard to the value of the undertaking, and he was paid his fair proportion of that total price. Similarly no shareholder would be a willing seller, knowing that the object of the purchaser was to acquire control of the company and that the purchase of every share was necessary to the securing of the specialized control desired by the purchaser, unless he was paid a price which represented the value of his shareholding to that purchaser ; the bargain between a willing seller and a willing buyer must be imagined to be made in friendly negotiation and on the basis that the only possible purchaser of a potentiality is willing to pay for it : see *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (1). Thus, even if, under the regulation, the shares are to be treated as purchased in individual blocks the same result is reached as if they were valued as a whole, since the potential value attributable to the opportunity of acquiring complete control of the company must be taken into account. That is a necessary consequence of the potential value. In an inquiry as to value all possible buyers must be taken into account and here one of them was the competent authority which was committed to buying all the shares for obtain control. Accordingly in each individual transaction with a shareholder the competent authority must be taken to be prepared to bargain in the light of the potentialities of the share or its special adaptability to the purpose of acquiring control. The value to the competent authority for that purpose must be considered. That value is determined by the proportionate interest in the company's undertaking which the particular share or block of shares represents. The potentiality of control is something additional to the mere market value of the shares taken by themselves. Nothing compels the arbitrator to fix the value on the basis of Stock Exchange prices, but it is cogent evidence of value and unless the appellants' method of ascertaining the value be adopted it is useless to send the case back to the arbitrator. But the award indicates that the arbitrator was himself in favour of the appellants' contentions. [They referred to *John Fowler & Co. (Leeds), Ld.* v. *Duncan* (1); Cripps on Compensation, 8th ed., p. 182; the Defence (Finance) Regulations, 1939 (St. R. & O. 1939, No. 1620), regs. 1 (*b*) and 2; and the Transport Act, 1947, s. 16, sub-s. 1, s. 17, sub-s. 1, s. 47, sub-s. 3 and sch. IV.]

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(1) [1939] A. C. 302, 316–8.

Sir Cyril Radcliffe K.C. and *H. L. Parker* for the respondents. This is a problem of construction. The appellants' hypothesis that, for the purposes of valuation, the sales are not to be treated as made by the holders of each individual block of shares, is not capable of being imported into the words of the regulation. Reading reg. 78 (5.), (6.) and (7.) as one piece of legislation, there is no doubt on construction that what was being dealt with was a series of separate transactions between the individual expropriated owners and the acquiring authority and that individual items of property were in question. On that assumption the value is to be fixed as the respondents contend. The facts are simple. By the Transfer Order each of the appellants was compulsorily divested of the shares he held and thereupon lost the value of those shares, not the value of some aliquot part of the company's property. The clear intention of reg. 78 (5.) is that each person expropriated should receive as compensation the value of what he has, viz., his holding. There is nothing in the regulation or in the general principles applicable to compulsory acquisitions to justify the ignoring of the plain fact that this is an acquisition of individual blocks of shares from individual shareholders. The value in this case was best ascertained by taking the Stock Exchange prices on the relevant day, though nothing in reg. 78 compels the value to be fixed in that way. For instance, a person who held 90 per cent. of the shares might receive more from a willing purchaser for each than a person who held only 1 per cent. As to the argument that in each individual transaction the price must be fixed in the light of the special potentialities of the shares, there is no inherent potentiality to which a separate value can be given, apart from the price between a willing vendor and a willing purchaser. The appellants' contention would give rise to great difficulties in distributing the total

(1) [1941] Ch. 450.

sum obtained as the price of the undertaking among the various classes of beneficiaries in cases where there were a number of different classes of shares. Further, the use of the words "any "shares" in reg. 78 (5.) is a reference to shares embraced in any individual parcel; it is these and not the shares as a whole which are to be valued.

Sir David Maxwell Fyfe K.C. in reply. The basis of the appellants' argument is that the shares are purchased by one single purchaser and that from the point of view of the owners of the shares, one cannot ignore that fact. The difficulties suggested in distributing the total sum obtained, as the price of the undertaking, among various classes of beneficiaries, are really shadow difficulties. There would be no difficulty in seeing that each individual got his proper fraction of the price, whether the appellants' or the respondents' method were adopted. As to the use of the phrase "any shares," in reg. 78 (5.), that might have been intended to provide for the case where there were different classes of shares. The assumption that the value to the purchaser of what he is acquiring is to be ignored is incorrect. Here the Crown is acquiring all the shares and, through them, the whole undertaking. It would be obviously unjust to ignore that fact, which, in the absence of clear words in the Regulations to the contrary effect, should not be ignored.

THE HOUSE took time for consideration.

LORD PORTER. My Lords, this is an appeal from a judgment of the Court of Appeal affirming a decision of Morris J. in the High Court. The question at issue involves a consideration of the sum to be paid to certain shareholders in Short Brothers (Rochester and Bedford), Ld., whom I shall call Short Brothers, by the Treasury when taking over the shares in that company. The issued capital of the company consisted of three classes of shares, viz., 230,475 redeemable preference shares of 1*l.* each, as to which no question arises, 250,000 "A" ordinary shares of 5*s.* each and 581,302 ordinary shares also of 5*s.* each. The voting power was concentrated in the ordinary shares and each "A" ordinary share entitled its holder to four votes as against one vote in the case of each ordinary share. No distinction however has been made or is claimed to exist between these two types of share for the purpose of this case, though it is clear that any one possessing 200,000 " A " shares would have control of the company.

As appears from the award itself, the respondents contended that the proper basis of valuation under reg. 78 (5.) was to assume that the shares had been purchased in individual blocks from individual shareholders on the date of transfer and to fix the value accordingly and that in fact that value was best ascertained from the prices ruling on the Stock Exchange on the relevant date, viz., the date on which the controller was appointed.

The appellants on the other hand contended that the transfer being a transfer of all the shares, the Stock Exchange value was not a true criterion: inasmuch as no order transferring the shares under para. 1 of reg. 78 was authorized unless it provided for the expropriation of all the shares. As they maintained, the proper method for fixing the price was first to ascertain the value of the whole undertaking and then to determine the proportionate value of each class of shares. They stressed the argument that the Crown was taking and could only take the whole of the shares and therefore must acquire the whole undertaking. No one, they contended, could acquire all the shares in a company except by paying for the business as a whole and, if the business as a whole is acquired, its value should be paid for. That, they say, was the view of the arbitrator and he has stated what that value amounts to when the appropriate division amongst the ordinary shares has been made. Even if, however, the shares be treated as purchased in individual blocks the same result, so the appellants contend, is arrived at, because the potential value which is attributable to the opportunity of acquiring complete control must be taken into account.

My Lords, as I understood the attitude of the appellants, no point was made that an inaccurate principle had been adopted or untrue figures accepted if the true method of ascertaining the shares was to value them share by share. Admittedly the Stock Exchange price was not necessarily the value of shares calculated on this principle but it was cogent evidence of their value and the appellants acknowledged that it would be useless to send the case back to the arbitrator unless their method of ascertaining the values were adopted.

In deciding which of the views presented to your Lordships is right, it is plain that regard must be had to, and the result reached by a consideration of, the language of reg. 78 and

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primarily of para. 5 of that regulation. That paragraph can, I think, be expressed in shortened form so as to exhibit its essential quality. In that case it would run: "The price "of any shares transferred shall be not less than the value of "those shares as between a willing buyer and a willing seller "on the date of the order made by that authority under para. 4 "of reg. 55." The date of an order made under para. 4 of reg. 55 is the date upon which a controller of the business is appointed, and in the present case that date was March 17, 1943. The value then which the arbitrator must put upon the shares is that which they had on March 17, and, in my view, that which they had before the controlling order was made, whether the effect of making it decreased or increased their value: that date being chosen, as I think, in order to make sure that no fictitious value should be placed upon the shares by reason of the fact that the Government were taking control and might expropriate them. At that time it was not in fact known that the undertaking was to be taken over or the shares transferred. They were not in fact transferred until March 22 and the order did not come into force until the twenty-third. In such circumstances it is difficult to see why the shares if bought in individual blocks should have any increased value attributed to them because the whole were transferred at a subsequent date. Nor do I think their value would be enhanced because there was a possibility of the Government subsequently taking them over. That factor must have been well known to both brokers and jobbers and would be a circumstance which would affect the value on the Stock Exchange. There is, therefore, no reason for attributing an increase in value to such a possibility.

As to the alternative argument that the value of the business as a going concern should first be ascertained, and then that global sum should be divided in due proportions between the different classes of shareholders: no doubt if the regulation had stated that the shareholders were to receive the value of their shares calculated upon their value on the sale of their business as a going concern the appellants' claim would be correct, but to my mind the regulation makes quite a different stipulation. It is true that under the order all the shares are to be transferred, but though all are transferred *to* the nominees of the Treasury, all are not transferred *from* one person, and it is the value to the willing seller of his holding which has to be ascertained, not a potentiality of control which he does not possess. The paragraph speaks of the price of "any shares" which naturally refers to those embraced in any individual parcel and it is those shares, not the shares as a whole, the value of which is to be ascertained as between a willing buyer and a willing seller, a phrase which to my mind means a willing buyer and a willing seller of those shares. If it were not so there would be great difficulty, if not impossibility, in distributing the total sum obtained as the price of the undertaking amongst the various classes of beneficiaries in cases where there were a number of different classes of shares: and even in the present case where the preference shareholders are only entitled to the nominal value of their shares on a winding-up the question might arise as to their value when they were being paid off, but the company was not being wound up.

This is the conclusion I should come to on the wording of para. 5 above, but such a construction is supported when one finds the phrase "any shares" used in paras. 6 and 7 as applicable to individual shares and not to the shares as a whole. It is true that that phrase is used in those paragraphs in reference to individual interests in particular shares and therefore it is necessary to interpret its use as applying in those paragraphs to the shares or parcels of shares individually, but the phrase is the same in each case, and I see no reason for interpreting it in a different sense in three successive paragraphs. It is used I think of individual shares in paras. 6 and 7 because that is its natural meaning and the fact that it is so used is a ground for refusing to attribute a less natural meaning to it in para. 5.

My Lords, in reaching this conclusion I do not find myself assisted by the provisions of other statutes or regulations dealing with the price to be paid for expropriated shares. Each contains its own terms and deals with questions incidental to the transfer of the particular interest taken over by the Government in specified industries. They follow no general principle and have no bearing the one on the other. Nor, when dealing with shares, do I find any useful analogy in the principles upon which the value of land compulsorily acquired is to be determined. If the principles adopted in *Raja Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* (1) be accepted as correct (which for the purposes of this case I am prepared to assume), viz., that land compulsorily acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined but also to the uses to which it is reasonably capable of being put in the future, still, in the first place, in the case of land the owner possesses a tangible asset whereas a shareholder has no direct share in the assets of a company, he has such rights as the memorandum and articles give him and nothing more: and in the second place, as has already been pointed out, there is no reason to suppose that the potentialities of the shares as existing before the control order was made were not fully represented in the Stock Exchange price.

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(1) [1939] A. C. 302.

My Lords, for these reasons, which are substantially those which influenced the learned judge and the Court of Appeal, I would dismiss the appeal and order the appellants to pay the respondents' costs.

LORD UTHWATT. My Lords, the point which the appellants seek to make good is that the appropriate method of fixing the price to be paid for shares acquired under reg. 78 is to ascertain the whole value of the undertaking of the company and then in light of that value to determine the proportionate value of the separate classes of shares and of individual shares within each class.

The matter is put in two ways—first on the construction of the regulation, and second (assuming the appellants to be wrong on the question of construction) as a necessary consequence of the value to be attributed to the potentialities of any share acquired pursuant to the regulation.

The first argument rests on the undoubted fact that the competent authority exercising the power conferred by reg. 78 must buy all the shares of the company. Paragraph 5 is, it is urged, to be construed against this background. All the shares taken as a single block are worth the value of the undertaking and each share must, as a matter of construction of the regulation, have a price allotted to it on the basis of that value.

My Lords, I agree that in construing para. 5 the background must be borne in mind, but I fail to see that this fact in any way assists the appellants. The transaction provided for by paras. 1 and 4 of the regulation is in form and substance the acquisition of shares by means of separate dealings with each shareholder. Paragraph 5 follows up this conception. On its plain language it is concerned with the fixing of a price as respects each and every share acquired. It is not concerned with fixing a price as respects all the shares taken as a single block or, as respects any share, a price based on the value of all the shares taken as a single block. There is nothing in para. 4 to suggest that in fixing a price the nature of the dealing in respect of which a price is to be fixed—an individual dealing—is to be thrust out of consideration, and the simple language used in this paragraph is not capable of being twisted into the complicated formula embodied in the appellants' contention. The picture painted on the background is clear and definite.

I desire only to add that if some one shareholder held a number of shares sufficient to carry control of the company, it might well be that the value proper to be attributed to his holding under the regulation was greater than the sum of the values that would be attributed to the shares comprised in that holding if they were split between various persons. The reason is that he has something to sell—control—which the others considered separately have not. The contention of the appellant, if accepted, would, as the Court of Appeal point out, deny him the real value of his holding.

The second argument, as I understood it in its final form, was as follows. In an inquiry as to the value of the shares as between a willing buyer and a willing seller, all possible buyers are to be taken into account. Among those buyers here was the competent authority which if it became a buyer was necessarily committed to buying all the shares and was, on the face of the regulation, buying for the purpose of obtaining control. In each individual transaction with a shareholder, therefore, the competent authority must be assumed to be ready to bargain in light of the potentialities of the share or its special adaptability to his purpose, namely the forwarding of the acquisition of control by him. Its value to him for that purpose was to be considered.

My Lords, I do not think the phrase " potentialities of the " share " or " special adaptability " carry one anywhere, or indeed have any particular meaning in relation to a share. A share always has the same qualities and potentialities. The appearance of a buyer needing the share for his particular purposes does not add to or detract from those qualities.

But the argument does not rest on the aptness of these phrases. The substance of it is that the competent authority is to be included among the possible willing buyers, and that, wanting control, he must be taken as prepared to pay for it up to the hilt. Its value is, therefore, to be determined by the proportionate interest in the company's undertaking which it represents.

There are, I think, more answers than one to this argument. I choose the easiest of them. That answer is that the argument disregards the facts. The competent authority can acquire under the regulation according to its true construction and not otherwise. One is therefore thrown back on the regulation. Under the regulation, though all the shares were to be acquired, they were to be acquired only through the machinery of a compulsory transaction with each shareholder. The price was to be not less than the value as between a willing buyer and willing seller on the date of the order appointing an authorized controller—which must be read as on that date immediately before the appointment of a controller took effect. That I call the critical date.

The conclusion desired by the appellants—that in valuing the individual blocks of shares, their proportionate share in the assets of the company measures the value between a willing buyer and a willing seller—cannot therefore be reached unless it be assumed that on the critical date—before any steps had been taken to bring the company in any form under control—there was a certainty that the competent authority would apply to the company a regulation in possibility applicable to all companies, and a certainty that the competent authority would ultimately step in and buy all the shares. The making of the assumption is obviously out of the question. Without that assumption the argument produces no result. I would dismiss the appeal.

LORD DU PARCQ. My Lords, I find myself in complete agreement with the opinions of my noble and learned friends who have just addressed your Lordships, and also with that of my noble and learned friend, LORD MORTON OF HENRYTON, which I have had an opportunity of reading in advance. I do not desire to add any words of my own. I am authorized by my noble and learned friend, LORD NORMAND, whose public duties require his attendance elsewhere, to say that he also agrees with those opinions and has nothing to add.

LORD MORTON OF HENRYTON. My Lords, the respondents contend that the proper basis of valuation of the shares in Short Brothers (Rochester and Bedford), Ld., under reg. 78, is to assume that the Minister has acquired all the shares in the company, in individual blocks from individual shareholders, on the date of the Control Order of March 17, 1943, and on this assumption to fix the value of all the shares on the basis of the prices ruling on the Stock Exchange on that date. It is common ground between the parties that the reference to "the date of "transfer" in para. 11 of the arbitrator's award must be treated as a clerical error, since the relevant date is that of the Control Order. It is also common ground between the parties that there is nothing in reg. 78 which compels the arbitrator to fix the value of the shares on the basis of the Stock Exchange prices. On the facts of this case, however, if the respondents' contention on the main question of construction is correct, I think that the Stock Exchange prices afford a fair criterion of the value of each block of shares, as between a willing buyer and a willing seller, on the relevant date.

For my part, I feel no doubt that the respondents' contention is correct. The regulation contemplates that the competent authority shall acquire all the shares in the company at one and the same time, but it also contemplates that he shall obtain these shares from the individual shareholders, and that each shareholder shall be paid for his shares in accordance with the provisions of para. 5 of the regulation, which has already been read.

The phrase "The price to be paid" assumes a seller and a buyer, and the "shares transferred" belong to the individual shareholders in the company. Each shareholder is a seller and in each case the competent authority is the buyer. The price is to be "not less than the value of these shares as between a willing buyer and a willing seller," on the relevant date. These words mean, to my mind, that each shareholder is to be assumed to be a willing seller of his shares on that date, and the competent authority is assumed to be a willing buyer of these shares on that date.

This is, in my view, the natural meaning of the words used in para. 5, and if that paragraph is read, as it ought to be read, in conjunction with paras. 6 and 7, it becomes still more clear that the price is to be fixed on the basis of sales of their respective holdings by individual shareholders. Paragraph 6 is clearly dealing with the case in which a block of shares belonging to an individual shareholder is subject to a mortgage, pledge or charge, and para. 7 gives each individual shareholder a right to go to arbitration if he thinks that the price to be paid for his shares is less than their true value.

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The contention of the appellants gives rise to many difficulties. I shall mention only one. If they are right, the phrase "those shares" in para. 5 means all the shares in the company, and the regulation is providing for a valuation of all the shares in the company, as one mass, on the basis of the value of the whole undertaking. If this is so, the regulation contains no provisions for apportioning this lump sum among the holders of various classes of shares. It is extremely unlikely that any regulation would be framed in such a way, and paras. 6 and 7 seem to me quite inconsistent with the view that only such a "mass" valuation has been dealt with in para. 5. In my view the Court of Appeal and Morris J. rightly construed reg. 78 and this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *William Charles Crocker.*
Solicitor for respondents: *Treasury Solicitor.*

Discussed. DAVIES *v.* SWAN MOTOR CO. [1949] 2 K. B. 291

[HOUSE OF LORDS.]

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1948
Mar. 2, 4, 5, 8, 9;
June 23.

GRANT . . . . APPELLANT;

AND

SUN SHIPPING COMPANY LIMITED AND ANOTHER . . . . . . RESPONDENTS.

Negligence—Contributory negligence—Injury to stevedore on ship—Shipowners and ship repairers—Duty as to hatch coverings and lighting—Statutory duties—Docks Regulations, 1934 (*St. R. & O.* 1934, *No.* 279), *regs.* 12, 37 (*a*), 45.

In the 'tween decks of a vessel in dock stevedores were engaged in rolling oil drums along the starboard alleyway which was lit by clusters of electric lights and beside which a hatch had been uncovered by ship repairers for the purpose of slinging a stage through it to work in the hold below. At the dinner interval, when the stevedores left, the working conditions were perfectly safe but, in their absence, the ship repairers finished their work and departed, leaving the hatch still uncovered and having also placed a light, which previously illuminated that part of the ship, face downwards on the port side so that it no longer did so. The leading stevedore, on his return with an oil drum, found himself in darkness and, seeing the glimmer of the down-turned light, made a movement in that direction, with the intention of fetching it, but fell down the uncovered hatchway, sustaining injuries.

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* *Present:* LORD PORTER, LORD UTHWATT, LORD DU PARCQ and LORD OAKSEY.

Held (per LORD PORTER, LORD UTHWATT and LORD DU PARCQ, LORD OAKSEY dissenting) (1.) that the ship repairers were guilty of negligence in moving the light and in leaving the hatch uncovered ; (2.) that the shipowners were also guilty of negligence in failing to ensure that the place where the stevedore was to work was reasonably safe ; (3.) that the stevedore was not guilty of contributory negligence and (4.) that both the ship repairers and the shipowners were liable to him in damages, since the negligence of both directly caused or contributed to the accident.

Per LORD PORTER. The decision whether the stevedore was guilty of negligence must be made in the light of the characteristics of the type of man affected, the question here being whether in the circumstances a prudent and experienced stevedore would instinctively conclude that the hatch covers were on.

Per LORD DU PARCQ. Besides their common law negligence, the ship repairers were also in breach of regs. 37 (*a*) and 45 of the Docks Regulations, 1934, and the shipowners were in breach of reg. 12.

Per LORD DU PARCQ. When separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrongdoers or from all of them and the effect of any negligence on the part of one is not necessarily broken by a later act of negligence on the part of the other.

Decision of the Second Division of the Court of Session reversed.

APPEAL from the Second Division of the Court of Session.

In this case the appellant [the pursuer] Robert Grant, sought to recover damages from the respondents [the defenders] the Sun Shipping Co., Ld., owners of the steamship *Empire Impala*, and Alexander Stephen & Sons, Ld., shipbuilders and ship repairers, or alternatively from one or other of them, in respect of personal injuries sustained by him on February 12, 1942. He was one of a gang of stevedores engaged in handling goods on the 'tween decks of the *Empire Impala* berthed at Stobcross Quay, Glasgow. The accident which caused his injuries occurred immediately after the dinner interval. On resuming work he fell through an open and unlighted 'tween deck hatch, sustaining serious injuries. The facts are fully set out in the opinions of their Lordships. The appellant based his case (*a*) against the first respondents, the managing owners

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of the ship, on their failure to comply with regs. 12 and 37 (*a*) of the Docks Regulations, 1934, which deal respectively with the duty to have efficient lighting and the duty to fence or securely cover open hatches; and (*b*) against the second respondents, who had been carrying out works at the hatch, on the ground of their negligence at common law, in failing to replace the covers of the hatch, which they had removed in connexion with their work, and leaving the hatchway uncovered and unlighted. Both respondents denied his averments of fault made against them and pleaded that the accident was caused or materially contributed to by fault on his part. On March 8, 1946, the Lord Ordinary, Lord Keith, held that the first respondents were solely to blame for the accident in respect of their failure to comply with the regulations, negatived contributory negligence on the part of the appellant and assessed damages at 800*l*. Against this interlocutor both respondents reclaimed. Each denied liability and maintained that the other respondents were alone liable, or alternatively, jointly liable with them, and both maintained that the appellant had been guilty of contributory negligence which barred his claim. On November 1, 1946, the Second Division pronounced an interlocutor, whereby they held that the appellant's own conduct amounted to negligence which was a substantial and material cause of the accident and that, therefore, his claim failed. They did not deal with the question of fault on the part of the respondents, holding it unnecessary to do so. The appellant appealed to the House of Lords.

Duffes K.C. and *Leechman* (both of the Scottish Bar) for the appellant.

M'Kechnie K.C. and *C. Shaw* (both of the Scottish Bar) for the first respondents.

Walker K.C. and *R. S. Johnston* (both of the Scottish Bar) for the second respondents.

The arguments sufficiently appear from their Lordships' opinions.

THE HOUSE took time for consideration.

June 23. LORD PORTER. My Lords, I have had the opportunity of reading the opinion to be delivered by LORD DU PARCQ and agree with him in thinking that this appeal should be allowed.

Prima facie the question whether a pursuer or defender was negligent or not is a matter for the judge who tries the case, or the jury, if there be one, provided of course that there is some evidence of negligence. In the present case, however, the matter is a little complicated owing to the fact that the Lord Ordinary did not see the whole of the witnesses and in particular did not preside when the pursuer was examined. No doubt this circumstance was unavoidable, but it is unfortunate, as it left him with little better material for judgment than that possessed by an appellate court and compels your Lordships' House, as I think it compelled the Second Division, to treat the decision and its ground somewhat more critically than would normally be necessary.

The essential facts can, I think, be presented in a short form. The pursuer and his mates were engaged in rolling heavy oil drums along the starboard alleyway of the 'tween deck from No. 3 to No. 1 hatch, passing No. 2 hatch on the way. That alleyway is about 18 feet broad and was lighted by three lights, two being on the starboard side and one on the port. The two on the starboard side, however, were screened so that they shone up and down the track of the alleyway and lighted it but did not light the No. 2 hatch or its coaming at all or at any rate only to a very limited extent. The port light on the other hand shone across the 'tween deck and lit up the hatchway and its coamings. Apart from these lights the forward part of the 'tween deck was in darkness as, though the hatch covers in the upper deck had been removed in the case of No. 3 hatch, they were still in position in the case of Nos. 1 and 2. On the morning of the accident the employees of the second defenders were engaged in fixing additional supports to the 'tween deck at No. 2 hatch and for this purpose had rigged up a simple platform consisting of a plank or two supported by wires attached to the upper deck and passing through the 'tween deck hatchway so as to suspend the platform at such a depth as to bring the workmen's eyes about level with the hatchway itself. At the same time the pursuer and his mates were rolling the drums of oil past the spot where this work was being carried on. At the dinner hour the stevedores knocked off work first, leaving the repairers still at work and having no information as to when that work would be likely to be finished. Before they left however they heard the third officer tell the second defenders' men to see that everything was secure and the hatches on before they knocked off. The pursuer and his fellows returned about one o'clock and at that time in fact the second defenders' employees had left the ship, taking all their gear with them. They asserted that they had replaced the covers upon the hatch at which they had been working, but the Lord Ordinary who saw these witnesses disbelieved them. As at least as many and probably more of the covers were off at this time and as there is no reason to suppose that anyone was in that neighbourhood or would have had any reason to open up the hatch it is difficult to see how otherwise the hatch could have been left uncovered. The other change which had taken place in the 'tween deck during the pursuer's absence was that the cluster of lights which had been fastened to the upper deck on the port side and lighted the hatch and its coamings, had been taken down and lay on the 'tween deck or in a barrow, with its light obscured. The Lord Ordinary, as I understand, drew the conclusion that the second defenders' men took down that cluster in order that by turning up its light towards the upper deck they might see to detach the wires supporting the cradle. At any rate those wires and the cradle were gone and the inference is almost inevitable that the light was removed for this purpose. The pursuer and his mates having returned after the dinner hour the pursuer himself was the first to resume the work up the alleyway which was well lit by the screened lights and he did not notice the absence of the port light. The repairers however had gone and he did not see the wires which had previously supported the cradle, though it may be that he did not consciously notice their absence. When however he had rolled his first drum up to and alongside No. 2 hatch, he found himself in semi-darkness, shouted to his fellows not to come forward and then looking round observed the missing light lying on the deck or on a barrow apparently below or almost below the position in which it had been slung. Thereupon without any thought of danger he stepped on the unlit open hatch and fell into the hold below, seriously injuring himself. For this injury he claims damages and in doing so confronts your Lordships with three questions: (1.) Were the first defenders negligent; (2.) were the second defenders negligent; and (3.) was he himself guilty of contributory negligence, a circumstance which in the then state of the law would deprive him of all right of recovery.

My Lords, all those who have dealt with the case in the Scottish courts have, I think, come to the conclusion that both the defenders were negligent, though the Lord Ordinary came to the conclusion that the second defenders' negligence was not a cause of the accident. That the second defenders were negligent seems to me to be incontrovertible. Lord du Parcq has set out the relevant regulations, referring in particular to reg. 45 which prohibits the removal of any hatch cover or lights, save when authorized or in case of necessity and ends with the words, "If removed, such things shall be restored at the end of the "period during which their removal was necessary by the "persons last engaged in the work that necessitated such "removal." But, indeed, unless there was some provision to the contrary I should consider that even in the absence of regulations workmen who had been working on a hatch on which a light was shining and knew that stevedores had been working in the neighbourhood and would return and yet left the hatch covers off and removed the light were plainly guilty of negligence at common law none the less so when it is remembered that they had been specially reminded of their duty by the third officer.

Whether the first defenders were guilty of negligence appears to me to be a much more difficult question, and I am not sure that, if left to myself, I should have found them guilty either of negligence or of breach of statutory duty. But those of your Lordships who agree with me in thinking that the appeal should be allowed think that some though not a large measure of blame for the accident should attach to them, and I am not prepared to differ. In taking the view that the first defenders were in fault, the Lord Ordinary came to the conclusion that they alone were liable to the pursuer. In his opinion the essential cause of the accident was the failure of the shipowners' servants to inspect the 'tween decks and see that the hatch covers were replaced and lights in their proper position. I agree with my noble and learned friend Lord du Parcq in thinking that this method of approach fails to give due weight to certain material considerations which should I think lead to a different conclusion. I see no break in the chain of causation existing between the negligence of the second defenders and the subsequent accident. At the vital moment the hatch covers were off and the light down. That negligence never ceased to operate nor were the second defenders entitled to rely upon someone afterwards coming to put it right. No doubt, if it be conceded that the first defenders had a separate duty to see that the lights were in position and the hatch covers in place, the consequences of the negligence of the second defenders might have been avoided, but it was still their negligence which directly caused or contributed to the accident.

There remains the question whether the pursuer was himself guilty of contributory negligence. This matter is largely a question of fact and if there was evidence from which a tribunal could fairly come to the conclusion that the pursuer was not himself negligent and if the judge or jury before whom the case was tried came to that conclusion, I imagine your Lordships would not interfere with the decision. It is, I think, not in dispute that the decision has to be made in the light of the characteristics of the type of men affected. In this case the man was a stevedore, used to taking the ordinary risks of loading and unloading a ship: no doubt not very ready in describing his mental processes, but plainly by his acts and indeed, as I think, by his words indicating that it never occurred to him as a possibility that the men who had been working on No. 2 hatch would take down the cluster lighting it and leave the covers off or indeed, in defiance of their duty, would leave the hatch open after their work was done, more particularly as they knew that stevedores were passing and repassing the hatch in the course of their work, and as they had been reminded by the third officer to leave all in order. In these circumstances he stepped on to the hatch without thinking of danger. It may be that "inadvertently" does not describe the act with complete accuracy, and perhaps "without con- "scious thought" is more exact—but everyone acts constantly upon the instincts gained by a lifetime of experience and I do not think the pursuer can be blamed for so acting. It is I understand, common ground that the only question which your Lordships have to determine in this part of the case is: would a prudent stevedore with a lifetime of experience behind him reasonably think that workmen who had both apparently and in fact gone and had taken down the light, which had previously shone across the deck, instinctively conclude that the hatch covers were on? I myself think he was justified in doing so and hold the view the more strongly in as much as the Lord Ordinary came to that conclusion and had evidence upon which he could do so. I would allow the appeal, and hold the defenders liable for damages and costs. Inter se however they should bear both damages and costs in the proportions suggested by LORD DU PARCQ.

LORD UTHWATT. My Lords, I have had the advantage of reading in advance the opinion which my noble and learned friend, LORD DU PARCQ, proposes to deliver. I entirely agree with his reasoning and his conclusions. In those circumstances I do not feel it necessary to do more than express my adherence to his opinion.

LORD DU PARCQ. My Lords, the pursuer, a dock labourer, was at work on board the steamship *Empire Impala* on February 12, 1942, when he fell through an uncovered, unfenced and unlighted hatch and was seriously injured. On May 28, 1942, he raised an action against (1.) the Sun Shipping Company, Ld., and (2.) Alexander Stephen & Sons, Ld., in which he alleged that he had suffered his injury by reason of the breach of statutory duty of the first-named defenders and the negligence at common law of both the defenders. It was difficult in war-time to procure the attendance of witnesses. Evidence had to be heard as and when it became available, without regard to order, and with much delay. In the result, the hearing of evidence, which began on May 1, 1944, was not concluded until January 25, 1946. It happened unfortunately that not all the witnesses were heard by the same Lord Ordinary. The hearing of evidence was begun by Lord Keith, but at an early stage in the proceedings that learned judge had to be replaced temporarily by Lord Mackintosh who heard a considerable body of important evidence. It seems to have been thought that as Lord Keith had begun the hearing of evidence it was desirable, if not essential, that he should continue the proof as soon as he was able to do so, and pronounce judgment. In accordance with this view Lord Keith resumed the hearing of evidence in time to hear six witnesses, of whom three were called on behalf of the first, and three on behalf of the second, defenders. In the unfortunate result he found himself compelled to form an opinion on much of the evidence, including that of the pursuer himself, solely on the written record. This misfortune no doubt added to the difficulty of his task, and it has not made that of your Lordships any the easier.

The appeal to this House is against an interlocutor of the Second Division of the Court of Session in which that court recalled the interlocutor of the Lord Ordinary who had awarded the pursuer the sum of 800*l.*, by way of reparation, against the first-named defenders. The Lord Ordinary held that the second-named defenders were under no liability to the pursuer.

In the Inner House it was held that the pursuer was not entitled to recover because of his own contributory negligence. Against this decision he appeals, claiming to be entitled to recover reparation from one or other of the defenders, or from both. The first-named defenders contend that their co-defenders were either solely to blame, or at least more gravely to blame than they were themselves. It is agreed on all sides that if the pursuer is entitled to recover anything, the Lord Ordinary has justly assessed the reparation to which he is entitled.

One satisfactory feature of the case is that there can now be no serious dispute about most of the material facts. I will state them as shortly as may be. On the morning of the accident the pursuer was one of a number of labourers who were engaged in shifting cargo on board the *Empire Impala*, which was owned by the first defenders. This cargo consisted of oil drums, which the men were rolling along the 'tween decks from the after end of hatch No. 3, past hatch No. 2, to the forward end of hatch No. 1. It was necessary to light artificially the part of the 'tween decks adjacent to hatches 1 and 2 because the covers of these hatches on the upper deck were in position and shut out the daylight. For this purpose three clusters of electric lights were in use. These clusters are portable and they had been arranged so as to light up the alleyway which ran between the hatches and the starboard side of the ship, along which the drums were being rolled. The Lord Ordinary (1) held it established " that in the forenoon . . . . " one cluster was fixed to a beam below the upper deck in " the vicinity of No. 3 hatch and on the starboard side of the " ship ; and that the second cluster was fixed to another beam " overhead at the after end of No. 2 hatch, also on the starboard " side . . . . A third light was fixed on the port side of the " ship at the forward end of No. 2 hatch and so arranged as to " throw light across the ship over No. 2 hatch and No. 1 hatch " to the place at which the drums were being stowed on the " starboard side." During the morning, while the pursuer and his fellow labourers were rolling drums, men employed by the second defenders were at work in the holds securing shoring so as to strengthen the decks and sides of the ship. They had removed some of the hatch covers of No. 2 hatch at 'tween decks level in order to make room for wires, which were attached to cross beams above the 'tween decks and supported a small scaffolding or staging of one or two planks hanging within the hatch below deck level. At mid-day the pursuer and those working with him left the ship for dinner. The pursuer says that during the morning he heard the ship's third officer telling Stephens' (the second defenders') men to see that everything was secure and the hatches on " before they left it," or " when " they finished," or " before they knocked off "—all these three expressions occur in his evidence. Mr. Caffrey, the third officer in question, was called as a witness for the first defenders, and said that he had told Stephens' men that they were to replace the hatch coverings. It seems from his evidence that he expected them to replace the coverings even if they left for the dinner interval before their work was completed, though he agreed, when cross-examined on behalf of the second defenders, that he would not expect the staging to be taken down each time the men went for a meal. His view was that " in the " ordinary practice of seamen " they should have replaced the hatch covers even though they were shortly to return, and I understand his evidence to be that the hatches could have been covered safely with space left for a wire or rope to pass between the battens. The pursuer and his fellow workmen returned to work at about 1 p.m. The second defenders' men had then all departed. Their work (I now quote from the Lord Ordinary's opinion (1)) " was finished some time in the morning of the " accident, and at latest before the pursuer returned to the " ship after the dinner interval." They had " removed all " their gear." Their " gear " included the staging and the supporting wires. The evidence satisfied the Lord Ordinary that they had not replaced the covers of the hatch before leaving ; indeed he finds (2) that " more hatch covers were off " after the dinner interval than had been off before dinner." The Lord Ordinary disbelieved the evidence of the second defenders' witnesses (which he had the advantage of hearing) to the effect that they had replaced the covers, and I am of opinion that his incredulity was fully justified. Further the Lord Ordinary found on the evidence (2) that " someone had " taken down the light which had been hanging on the port " side and left it lying face down, either on the deck or in a " barrow that was standing there." Later, he says (2) that " it was one of their " (viz., the second defenders') " men who " took down the light from the port side of the 'tween decks " and left it on the deck floor." The evidence amply supports this finding. It is thus obvious that whereas before the mid-day interval the conditions under which the pursuer had worked were safe enough, a new peril had been created by the time it terminated. The pursuer was the first of his gang to restart work. He was rolling a drum forward. He says that he "came to a darkness" and then "looked and saw the light was "away." He shouted a warning to the men who were behind him to come no further, and then "saw the light away over on "the other side of the ship shining on to the wing of the ship." Taking it for granted (he says) that the hatch covers were on and everything secured he turned round to go and get the light, "stepped off with one foot and went down the hatch." I need not at this point quote further from his evidence, or comment on it.

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(1) (1947) 80 Ll. L. Rep. 45, 46.

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(1) 80 Ll. L. Rep. 47.

(2) Ibid. 45, 47.

My Lords, the pursuer has averred that the second defenders were negligent at common law, and the first defenders have further averred against them breaches of statutory duty. I have no doubt that the servants of the second defenders owed a duty to the pursuer as one of a body of workmen who as they well knew, had been working, and were about to resume work, close to No. 2 hatch. Whatever statutory regulations may enjoin, common prudence might suggest that when it has become necessary to uncover a hatch, the person who has uncovered it should replace the covers at the first reasonable opportunity. If hatches are for some reason left uncovered, at a time when it is known that men will shortly be taking up work near by, it is I think plainly negligence of a dangerous kind to leave them in darkness. When once it was established that the second defenders were responsible for leaving the hatch uncovered and unlighted the charge of negligence made against them was fully made out. I will consider whether they were also guilty of a breach, or breaches, of statutory regulations, as the first defenders (but not the pursuer) averred, when dealing with the case of the first defenders, to which I now turn. Their position differs from that of the second defenders, upon whom the duty of replacing the hatch coverings primarily lay. The question is whether the first defenders can justly say that, in the circumstances of this case, they had come under no obligation to the pursuer and were entitled to rely on the second defenders to complete their work.

So far as the regulations are concerned, the matter stands in this way. The relevant provisions are contained in the Docks Regulations, 1934, (St. R. & O. 1934 No. 279), which were made under the Factory and Workshop Act, 1901, and are now continued in force and deemed to have been made under the Factories Act, 1937, by virtue of s. 159, sub-s. 1 of the latter Act. The regulations are made in respect of certain " pro-" cesses," which include " moving and handling goods in, on " *or at* any dock, wharf or quay." The *Empire Impala* was at the quayside and there can be no doubt, I think, that the pursuer was engaged in moving and handling goods " at " a quay. Regulation 12, in Part II., with which it was " the " duty of the owner, master or officer in charge of the ship to " comply " (see the heading (*b*) under " *Duties* ") provides that " all parts of the ship to which persons employed may be " required to proceed in the course of their employment, shall " be efficiently lighted, due regard being had to the safety . . . . " of all persons employed," which means, under the definition clause, persons " employed in the processes." Regulation 14 requires that: " All hatch coverings shall be kept plainly " marked to indicate the deck and hatch to which they belong " and their position therein," with a proviso which is applicable when hatch coverings are interchangeable. Regulation 37 (*a*) begins with the provision that: " If any hatch of a hold " accessible to any person employed and exceeding five feet " in depth . . . . is not in use for the passage of goods, coal " or other material, or for trimming, and the coamings are " less than two feet six inches in height, such hatch shall " either be fenced to a height of three feet or be securely " covered." This regulation (which admittedly applied to the hatch now in question) contains the proviso that the requirement shall not apply " to any vessel during meal times or other " short interruptions of work during the period of employ-" ment," and further provides that hatch coverings are to be replaced in the positions indicated by the markings made on them in pursuance of reg. 14. Regulation 37 is in Part IV., and it is " the duty of every person who by himself, his agents, " or workmen carries on the processes and of all agents, work-" men, and persons employed by him in the processes " to comply with it. (See under *Duties* (*d*).) These words are followed by the proviso that " where the processes are carried " on by a stevedore or other person other than the owner of " the ship, it shall be the duty of the owner, master or officer in " charge of the ship to comply with reg. 37 so far as it concerns " (1.) any hatch not taken over by the said stevedore or other " person for the purpose of the processes, and (2.) any hatch

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"which, after having been taken over by the said stevedore or "other person for the purposes of the processes (i.) has been "reported by written notice in the prescribed form to the "owner, master or officer in charge of the ship, by or on behalf "of the said stevedore or other person, as being a hatch at which "the processes have been completed or completed for the time "being, and (ii.) either has been left by the said stevedore or "other person fenced or covered as required by reg. 37, or "has been taken into use by or on behalf of the owner of the "ship, and in either case has been so reported by such written "notice as aforesaid." The last of the relevant regulations is that numbered 45, the material words of which are as follows: "No person shall, unless duly authorized or in case of necessity, "remove or interfere with any . . . . hatch covering . . . . "lights . . . . or other things whatsoever required by these "regulations to be provided. If removed, such things shall "be restored at the end of the period during which their "removal was necessary by the persons last engaged in the work "that necessitated such removal."

My Lords, I think that there is no doubt that these regulations imposed on the second defenders the duty of replacing the hatch-covering and of leaving in place the light which was necessary for the illumination of that part of the ship in which the pursuer was working. The question was raised in argument whether the words "required by these regulations to be "provided" in reg. 45 were to be read as qualifying only the words "other things whatsoever" or as qualifying all the preceding substantives. Little perhaps turns on this, since there was plainly a breach of reg. 37 on the part of the second defenders, but I have no doubt that the former construction is correct. No other seems to me to be possible with due regard to the context. One of the preceding words is the general word "gear," and it cannot have been the intention of the Secretary of State to prohibit the removal only of such gear as was required by the regulations to be provided.

The first defenders seem, at first sight, to be in better case, and they are certainly in a position to say that the duty of replacing coverings was primarily on the second defenders, and that (as is admitted) the second defenders never reported to them or to their officers by written notice that the "processes" had been completed. They are, however, shown to have failed in their duty under reg. 12, and but for that failure the fact that the hatch coverings had not all been replaced would have been apparent to the pursuer. Even if there were no regulations to be considered, I should have thought the first defenders liable for negligence. The pursuer was an invitee in their ship, and their officers knew that he would be returning to resume work after the dinner interval. It was, therefore, the duty of their officers to see that the place where the pursuer was to work was reasonably safe, and they are not absolved from this duty, as between themselves and the pursuer, by requirements in the regulations which made it incumbent on the second defenders to do that which in fact they left undone. The officers ought not to have contented themselves with telling the second defenders' men to make all secure, but ought to have made sure that the order had been carried out before the pursuer began work in the afternoon. On this view of the case the importance of the regulations is lessened, but I have dealt with them fully because they throw some light on the most difficult part of this case, namely the question whether there was contributory negligence on the part of the pursuer. I am leaving this question to the end, chiefly because it is best considered in its setting and in relation to the nature of the fault attributable to the first and second defenders.

On the facts as I have stated them, accurately as I believe, the Lord Ordinary's conclusion that liability must rest on the first defenders alone seems to me surprising. It would not, I think, lead to a just result, and I am satisfied that it has no legal foundation. It was said by Mr. Walker that it was founded on authority, and in particular on the authority of two Scottish cases, *Macdonald* v. *Andrew Wyllie & Son* (1) and *Eccles* v. *Cross & M'Ilwham* (2). I do not wish to cast doubt, or indeed to express any opinion whatever, on either of these decisions, because in my opinion neither of them is of assistance in the present case. The decision in the first of the two cases was that, as between a master and his servant, the master was bound to supply safe plant, and that it could not avail the master to say that he had employed skilled persons to erect the plant. In the later case the decision was on relevancy, and it was held that the relation between an injured party and the defender was too remote to make the defender liable on the principle established by *Donoghue* v. *Stevenson* (3), when his alleged negligence, as a contractor, in fitting an electric installation in a building was said to have caused the death of the pursuer's husband two months after the work had been completed. The decision was founded on the pursuer's own averments that the owners of the building had had an opportunity and duty of inspection.

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(1) (1898) 1 F. 339.
(2) 1938 S. C. 697.
(3) [1932] A. C. 562.

My Lords, I regard it as a well-settled principle that when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrongdoers, or from all of them. The Lord Ordinary's view was (1) that "the effect of any "negligence of the second defenders was broken by the later "negligence of the first defenders." This reasoning seems to me to be akin to that which has led to frequent and determined attempts to establish the so-called "rule of the last "opportunity," of which less will be heard since the decision of your Lordships' House in *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*) (2). I refer especially to the opinion of Viscount Simon (3). With the greatest respect for the Lord Ordinary's opinion I think that his reasoning is fallacious. If the negligence or breach of duty of one person is the cause of injury to another, the wrongdoer cannot in all circumstances escape liability by proving that, though he was to blame, yet but for the negligence of a third person the injured man would not have suffered the damage of which he complains. There is abundant authority for the proposition that the mere fact that a subsequent act of negligence has been the immediate cause of disaster does not exonerate the original offender. In the well-known case of *Burrows* v. *March Gas & Coke Co.* (4) the defendant company broke a contract with the plaintiff by supplying him with a defective pipe, but the immediate cause of an explosion which caused damage to the plaintiff was the negligence of a third party, a gas-fitter who having been called in to look for the source of an escape of gas searched for it with a lighted candle. The company was held liable. Cases in which independent acts of negligence on the part of two drivers cause injury to a third person must be heard almost daily, and they are not, in my experience, decided by considering whose act of negligence was the last link in a chain of causation. As Lord Herschell said in your Lordships' House in *Mills* v. *Armstrong* (*The Bernina*) (1): " If by a collision " between two vehicles a person unconnected with either vehicle " were injured, the owner of neither vehicle, when sued, " could maintain as a defence, 'I am not guilty, because but " 'for the negligence of another person the accident would " 'not have happened'." In the same case, *The Bernina* (2), Lord Esher M.R. in the Court of Appeal, discussed the question " what is the law applicable to a transaction in which " a plaintiff has been injured by negligence, and in the course " of which transaction there have been negligent acts or " omissions by more than one person ? " The learned Master of the Rolls said that upon many points as to such a transaction the common law was clear, and stated the first of these points in these words (2): " If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by " another independent person, both negligences partly directly " causing the accident, the plaintiff can maintain an action for " all the damages occasioned to him against either the defendant " or the other wrongdoer."

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(1) 80 Ll. L. Rep. 45, 47.
(2) Ante p. 140.
(3) Ibid. 149.
(4) (1872) L. R. 7 Ex. 96.

My Lords, it was truly said by counsel for the appellants that the case now before your Lordships would in normal times have been one proper for the consideration of a jury. A jury would not have profited by a direction couched in the language of logicians, and expounding theories of causation, with or without the aid of Latin maxims. It would, I think, have been right to instruct them in language similar to that used by Lord Esher in the passage which I have just quoted. For my own part I have no doubt (leaving aside for the moment the question whether fault can be attributed to the pursuer) that the negligence and breach of statutory duty attributable to each of the defenders " partly " and " directly " caused the pursuer's injuries. Whether or not a cause is a " direct " cause is sometimes a difficult question, but here the precautions, which the regulations prescribed and ordinary prudence should have dictated, have for their object the prevention of accidents of the very nature of that which befell the pursuer.

I now come to the question whether the pursuer is shown to have been guilty of contributory negligence. I will adopt the formula used by Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (3), and ask myself: " Have the " defenders proved that the injury was caused solely or in part

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(1) (1888) 13 App. Cas. 1, 9.
(2) (1887) 12 P. D. 58, 61.
(3) [1940] A. C. 152, 166.

"by the omission of the pursuer to take the ordinary care that "would be expected of him in the circumstances ?" This is a question of fact, or, more strictly, of the inference to be drawn from the facts, on which normally an appellate court is properly reluctant to disturb the finding of the judge who tried the case. Here, however, the judge had not the usual advantage of hearing all the evidence, and in particular did not hear the evidence of the pursuer, and I think (in agreement with the Second Division) that the reasons which he gave for his decision are not wholly satisfactory. Unless the opinion of the Second Division itself seems unsatisfactory to your Lordships, doubtless it ought to be affirmed. If, on the other hand, the ultimate decision of the Lord Ordinary on this point was right, though his reasons for it may be unconvincing, the interlocutor appealed from ought not to stand. I must now state my own view of the matter. I accept the evidence of the pursuer as that of a truthful man, and I assume that his memory of the occasion was not gravely impaired as a result of his injuries. It must be remembered, however, that his evidence was given long after the event, and his account of an occurrence which must have been much on his mind while litigation was pending may well have been to some extent a reconstruction of an incident which had itself passed in a flash. It is right therefore to test it in the light of the probabilities and the known facts of the case. One salient fact is that if the second defenders had done their duty the pursuer could have done what he did without the slightest danger. They had finished their work, and ought to have replaced the hatch-coverings. The pursuer in several of his answers seems to suggest, and perhaps impliedly to state, that he knew that the second defenders' men had finished and gone, but he nowhere says so in terms, and it was rightly pointed out that the evidence of some of his workmates shows that they at any rate had no such knowledge. It is therefore right, I think, to deal with the case on the footing that the pursuer knew only, what of course he could not help observing, that the repairers were not at work when he returned. On this assumption they might, for all he knew, be only temporarily absent. If that were so, what would he naturally assume the state of the hatchways to be ? The regulations to which I have referred are intended to ensure that hatchways shall normally be covered and shall never be both uncovered and unfenced, and also unlighted. If, during short interruptions of work, they are left uncovered, the obligation to keep them sufficiently lighted when men are at work in their neighbourhood provides the necessary protection. It is reasonable to suppose that, even apart from the regulations, the precautions which they enjoin would be taken, as a matter of common prudence, in every well-regulated ship. If this be so, an ordinary workman must get into the habit of thinking that uncovered hatchways are never left unlighted and may argue from this, not I think illogically, that if a hatchway has been left in darkness not only by experienced ship repairers but also by the ship's officers, the coverings must be on. This, according to the pursuer, was his own state of mind. "I thought," he says, "the men would have put on the hatches and left it "secure and, if it was them that took the light, that they would "not have taken the light away and left a hole." If I am right in thinking that the danger of uncovered hatchways must be a matter of constant concern to those who serve and work in ships and that it is an elementary duty to take the usual precautions against that danger, it cannot be said that the pursuer was to blame for inferring that No. 2 hatch must be covered and therefore safe for his purpose. There is no doubt that he acted quickly and without prolonged thought. He says that he and his mates were dealing with "Red Cross cargo" and were hurrying to get it shifted. This does not necessarily mean, however, that his action was "involuntary" (as the Lord Ordinary put it (1)) or merely instinctive, or thoughtless. It is right to remember that the human mind can, and often does, take in a second, or a fraction of a second, decisions which can only be taken in the light of past experience and acquired knowledge, and which involve some degree of ratiocination. The Lord Ordinary (1) thought that the pursuer had suffered a "lapse of memory" and forgotten that some of the hatch coverings were off before dinner-time, and in the Inner House much was made of the fact that the pursuer had known that they were off at that time. In my opinion the important question is not what he had seen the condition of the hatch to be before dinner-time, but what his years of experience as a dock labourer taught him to expect its condition to be in the circumstances which he found on his return. He was not asked how often (if ever) in his long experience he had been set to work, without warning, in the proximity of an unlighted, unfenced, uncovered hatchway. It is, I hope, safe to assume that so perilous a task is never imposed on a dock labourer.

(1) 80 Ll. L. Rep. 45, 46.

My own conclusion, therefore, is that the pursuer did not fail to take the ordinary care that would be expected of him in the circumstances. If the standard of the conduct of "an ordinary "prudent man" is preferred, I do not think that his own conduct fell below it. Almost every workman constantly, and justifiably, takes risks in the sense that he relies on others to do their duty, and trusts that they have done it. I am far from saying that everyone is entitled to assume, in all circumstances, that other persons will be careful. On the contrary, a prudent man will guard against the possible negligence of others when experience shows such negligence to be common. Where, however, the negligence is a breach of regulations, made to secure the safety of workmen, which may be presumed to be strictly enforced in the ordinary course of a ship's discipline, I am not prepared to say that a workman is careless if he assumes that there has been compliance with the law. The real complaint of the defenders is that the pursuer reposed an unjustified confidence in them. No doubt his confidence was not justified in the event, but he is not, I think, to be blamed for that. The courts have long recognized that in some circumstances an omission to make sure for oneself that others have done what they ought to have done is not negligent. Thus, when a railway passenger who had leant against a carriage door, which he had erroneously supposed to be properly fastened, had fallen through it and suffered injury, it was unanimously held in the Exchequer Chamber that he was entitled to hold a verdict against the company, and three of the judges were of opinion that there had been no evidence of contributory negligence to go to the jury. He had, in the words of Keating J. "a right to assume that the company were not "negligent, and that all the doors were properly shut:" (*Gee* v. *Metropolitan Ry. Co.* (1).)

My Lords, under s. 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, it would have been necessary for the Lord Ordinary, if he had not discharged the second defenders from all liability, to consider in what proportions the defenders ought to contribute inter se to the damages. For myself I am prepared to agree with the view indicated by Lord Mackay that 75 per cent. of the agreed figure of 800*l.* (and expenses) should be contributed by the second defenders and 25 per cent. by the first defenders, and I suggest to your Lordships that this is a reasonable apportionment.

(1) (1873) L. R. 8 Q. B. 161, 174.

I would allow the appeal. I think that the interlocutor of the Second Division should be set aside, and the interlocutor of the Lord Ordinary varied so as to make both defenders liable to the pursuer in the proportion which I have mentioned, and that the pursuer should have expenses throughout.

Lord Oaksey (read by Lord Uthwatt). My Lords, this is an appeal from a judgment of the Second Division of the Court of Session, reversing the judgment of Lord Keith, the Lord Ordinary, in an action by the appellant, a stevedore, against the first defenders, the shipowners, and the second defenders, a company of ship repairers, for damages for injuries sustained by him when he fell through an open hatch into the hold of the first defenders' ship in which he was working. The Lord Ordinary, who only heard a part of the evidence and did not hear the appellant give his evidence, decided the case in the pursuer's favour on the view that the pursuer was not guilty of contributory negligence and that the first defenders were alone liable as being the last party at fault. The Second Division allowed the appeal, holding that the pursuer was guilty of contributory negligence.

The facts are as follows: The steamship *Empire Impala* belonging to the first defenders was on the day of the accident February 12, 1942, berthed at Stobcross Quay, Glasgow. There is no plan of the ship but it appears that she was about 53 feet abeam with three hatches in the 'tween deck 18 feet wide, No. 2 hatch being about 30 feet along. During the morning of the day of the accident the appellant had been engaged rolling oil drums weighing 3-4 cwts. along the 'tween deck of the ship from a point near No. 3 hatch to a point forward of No. 1 hatch along an alleyway about 17½ feet wide between the hatches and the ship's starboard side. Meanwhile the second defenders' men were shoring up the 'tween deck and for this purpose were working on a staging hung by wires suspended from the deck above, so that the staging was a few feet below the hatch coaming and inside No. 2 hatch. Sufficient hatch covers were removed for the purpose of this work. The 'tween deck was then lit by three clusters of lights, two on the starboard side casting light up the starboard alleyway and one cluster on the port side near the forward end of No. 2 hatch, casting light across the ship so that the stevedores could see where the oil drums were to be stowed. At about noon the stevedores went to their dinner leaving the ship repairers at work. The ship repairers finished their work and left some time later without, so far as the evidence shows, reporting to anyone in the ship, but, as the Lord Ordinary has found, leaving No. 2 hatch partly uncovered and the port cluster of lights moved from the place it had been in. At about 1.10 p.m. the stevedores returned and the pursuer was the first man to roll an oil drum up the starboard alleyway. When he got to a point near the forward section of No. 2 hatch he found himself in darkness and observed that the port cluster of lights had gone : he stopped and shouted to the men behind him to stop because there was no light : he then looked round and saw a light on the port side and, without looking or feeling in any way with his hands or feet, he stepped on to the hatch coaming intending to walk across the unlighted hatch covers at the forward end of the hatch to get the light, and fell through the open hatch covers into the hold and was injured. His own explanation of why he took this course was that he had heard one of the ship's officers say to the ship repairers that when they finished their work they should see that everything was secure. Neither he nor his foreman nor anyone else knew whether the ship repairers had finished their work : for all that the pursuer knew the ship repairers might have been coming back after their dinner : he did not observe that the staging and its wires had gone : he did not look at the aft section of No. 2 hatch to see if the hatch covers were still on, though he admitted that if he had looked he could have seen.

The pursuer's case before your Lordships was that an ordinarily prudent man would have assumed from what he had heard the ship's officer say to the ship repairers and from seeing the port light removed that the ship repairers had finished their work and replaced the hatch covers. It has also been suggested that a workman is entitled to assume that the regulations have been carried out, and that therefore the pursuer was entitled to assume that No. 2 hatch must be covered. But in my opinion no such inference could reasonably have been drawn from what the pursuer saw, nor is his evidence consistent with his having drawn this inference. He says that he stopped and told the men behind him to stop because there was no light. In such circumstances he could not have thought that the respondent shipowners had performed their duty adequately to light the ship whilst the stevedores were rolling the oil barrels up the starboard alleyway. He knew that they had not and he stepped across the hatch to remedy the default. The port cluster of lights was found by Breslin, the pursuer's foreman, face downwards in a barrow after the accident, and although the pursuer could not see its exact position he must have seen that it was in an unusual position and could not, in my opinion, reasonably have drawn the inference from it that the ship repairers had left everything secure. There was no urgency or crisis: Breslin the foreman was within earshot and had a torch: the pursuer had only to turn round and go round the aft end of No. 2 hatch, which he says was better lighted, or he could have felt his way round the forward end of No. 2 hatch. He did not try to do either: he neither looked nor felt but started to walk straight over an unlighted hatch.

It is always a difficult and unpleasant task to decide the issue of contributory negligence in the case of a workman who was doing his duty, but the fact that it is natural to sympathize with such an injured workman makes it all the more necessary to address one's mind solely to the question whether he acted as an ordinarily prudent man would have acted in all the circumstances. In my opinion the appellant did not and I entirely concur in the judgments of the Lord Justice-Clerk and Lord Jamieson.

Appeal allowed.

Solicitors for appellant: *O. H. Parsons, for Herbert Macpherson, S.S.C., Edinburgh, and L. & L. Lawrence, Glasgow.*

Solicitors for first respondents: *Botterell & Roche, for Beveridge, Sutherland & Smith, W.S., Leith, and Montgomerie, Flemings, Fyfe, Maclean & Co., Glasgow.*

Solicitors for second respondents: *Beveridge & Co., for Morton, Smart, Macdonald & Prosser, W.S., Edinburgh and Biggart Lumsden & Co., Glasgow.*

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